

FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION



FEBRUARY 1984
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No. 2

DECISIONS

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FEBRUARY

The following cases were Directed for Review during the month of February:

Jack Gravely v. Ranger Fuel Corporation, Docket No. WEVA 83-101-D; (Judge Koutras, January 13, 1984)

Secretary of Labor, MSHA v. Monterey Coal Company, Docket No. HOPE 79-323-P; (Interlocutory Review of Judge Fauver's December 28, 1983 Order)

Review was Denied in the following cases during the month of February:

Secretary of Labor, MSHA v. U.S. Steel Mining Company, Docket Nos. PENN 82-218, PENN 82-219; (Judge Fauver, December 28, 1983)

William Haro v. Magma Copper Company, Docket Nos. WEST 79-49-DM, WEST 80-116-DM; (Judge Morris, January 20, 1984)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 14, 1984

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. KENT 80-318-R
	:	KENT 81-32
PEABODY COAL COMPANY	:	

DECISION

The narrow issue in this case is whether an authorized representative of the Secretary of Labor, employed as a "special investigator", needed to obtain a search warrant in order to require the mine operator to produce certain accident and illness reports required to be kept by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and its implementing regulations. The Commission administrative law judge held that a search warrant was not required. 4 FMSHRC 447 (March 1982)(ALJ). For the reasons set forth below, we agree.

The issue in this case arose in a factual context uncontested by the parties. There was no hearing; the case was decided on the basis of joint stipulations and copies of exhibits that the parties submitted to the judge. One of the exhibits is the affidavit of Byron Culbertson, a Peabody Coal Company employee, stating that he was injured on May 9, 1977 "while timbering and crosscolaring [sic] a rock fall that had been cleared in the main north area." According to the affidavit, Culbertson informed his face boss that afternoon of the injury, and an accident report was later completed by the assistant mine foreman. Id.

Peabody submitted a standard-form "Coal Accident, Injury, and Illness Report" (SF 7000-1) concerning the rock fall to MSHA. Govt. Ex. 2. 1/ The parties stipulated that this report states that no injury occurred. On July 29, 1980, a United Mine Workers of America ("UMWA") official filed with

1/ The rock fall occurred while the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) was in effect. The 1969 Coal Act was enforced by the Department of Interior's Mining Enforcement and Safety Administration (MESA). With enactment of the 1977 Mine Act, MESA's enforcement functions were transferred to the Department of Labor's Mine Safety and Health Administration (MSHA). All references here will be to MSHA.

the district manager of MSHA's Madisonville, Kentucky office a written request for an inspection pursuant to section 103(g) of the Mine Act. 2/ The UMWA official's request for inspection stated:

I have reasonable grounds to believe that a violation of Title 30, Federal Regulation Part 50.20 has occurred concerning the filing of Report Form 7000-1, at Peabody Coal Company's Ken Mine of a rock fall accident on 5/9/77.

Byron Culbertson was injured in this accident. The attached copy of 7000-1 Form does not reflect that there was an injury. Therefore, I am requesting an immediate inspection (or investigation) under 103(g) of the Act to determine whether there is a violation or not.

Govt. Ex. 3. 3/ The request apparently included a copy of Peabody's "Coal Accident, Injury, and Illness Report," referred to above. MSHA found "no record of the injury suggested by the letter of the UMWA official." Stip. 6.

2/ Section 103(g) provides:

Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

30 U.S.C. § 813(g)(1)

3/ The issue in this proceeding is not whether Peabody in fact kept records required by the Mine Act and the regulations, but whether a warrant was required before the MSHA official could review such records. There is no dispute between the parties that the records at issue here were required records under the Act.

Thereafter, the MSHA district manager sent an MSHA special investigator, Jesse Rideout, to the mine to inspect Peabody's records relating to the rock fall and purported injury. Rideout stated his purpose at the mine office to Peabody's safety director and gave him a copy of the UMWA's section 103(g) request. Rideout requested no other records. The safety director informed Rideout that Peabody previously had filed with MSHA all required reports relating to the rock fall and he refused to allow Rideout to see the records that Peabody was required to keep at the mine office. This decision not to produce the records in the absence of a search warrant was reaffirmed to Rideout in a telephone conversation with counsel for Peabody.

On instructions from counsel for the Secretary, Rideout again demanded to see the required records pertaining to the rock fall and injury. Peabody's mine superintendent repeated the company's refusal and Rideout proceeded to issue a citation and withdrawal order alleging a violation of the Mine Act which Peabody refused to abate.

Peabody filed a notice of contest with the Commission challenging the citation and order and the proceeding was consolidated with MSHA's proposal for an assessment of a civil penalty. Relying primarily on the Supreme Court's decision in Donovan v. Dewey, 452 U.S. 594 (1981), the Commission administrative law judge found that Peabody violated the Mine Act by refusing to produce the requested records. The judge therefore upheld the citation and assessed a \$500 civil penalty. We granted Peabody's petition for review and heard oral argument.

On review Peabody argues that the judge erred in finding "that the inspection was not of the type so random, infrequent or unpredictable that the appellant, for all practical purposes, had no real expectation that its property would from time to time be inspected by government officials." Peabody argues that a search warrant was required for this specific records request because Inspector Rideout was a "special investigator" whose appearance at the mine in response to a section 103(g) request could not have been predicted. Peabody repeatedly refers to the fact that the official duties of a special investigator include conducting investigations that, in appropriate circumstances, could lead to the institution of criminal proceedings by law enforcement officials. In Peabody's view, a warrant would not have been required had the same request been made by a "regular" mine inspector.

We affirm the judge's conclusion that a search warrant was not required in this case. Peabody has not established that it has a privacy interest in these records necessitating the protection of a search warrant. Section 103(d) of the Mine Act requires operators to maintain accident records and make them "available to the Secretary or his authorized representative." It also provides that "[s]uch records shall be open for inspection by interested persons." 4/

4/ The complete text of section 103(d) reads as follows:

All accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the

(Footnote continued)

In accordance with the Act, the recordkeeping regulations in effect at the time of the rock fall in 1977 (30 C.F.R. §§ 80.22, .23 and .31(a)(1977)) and the similar regulations in effect at the time of inspection in 1980 (30 C.F.R. §§ 50.20, .40, .41 (1980)), clearly delineate the operator's duty to investigate accidents and make reports of them. The operator is required to maintain the reports for five years and make them accessible on demand to the Secretary or his authorized representative as well as any interested person. Based on these statutory and regulatory provisions, we conclude that Peabody had no realistic expectation of privacy in these records. See United States v. Blue Diamond Coal Company, 667 F.2d 510, 521-22 (6th Cir. 1982)(Wiseman, J., concurring); Youghiogheny and Ohio Coal Company v. Morton, 364 F. Supp. 45, 51 n. 5 (S.D. Ohio 1973). 5/

The fact that this inspection was conducted by an MSHA "special investigator" rather than a "regular" MSHA inspector, is of no consequence. The Mine Act refers only to "authorized representatives" of the Secretary of Labor and does not distinguish between "regular" inspectors and "special investigators." The fact that the Secretary may have established different classes of authorized representatives is not relevant in the circumstances of this case. Both "regular" inspectors and "special investigators" are authorized to issue citations and orders when they discover violations of the Act, standards, and regulations, and the findings of any authorized representative may, if appropriate, be referred to the Department of Justice for possible criminal prosecution. Accordingly, Peabody's potential liability was in no way heightened by the Secretary's choice of a special investigator to conduct the statutorily authorized section 103(g) inspection. 6/

Peabody stipulated that the special investigator was an authorized representative of the Secretary. Peabody violated the Act in refusing

Fn. 4/ continued

operator or his agent to determine the cause and the means of preventing a recurrence. Records of such accidents and investigations shall be kept and the information shall be made available to the Secretary or his authorized representative and the appropriate State agency. Such records shall be open for inspection by interested persons. Such records shall include man-hours worked and shall be reported at a frequency determined by the Secretary, but at least annually.

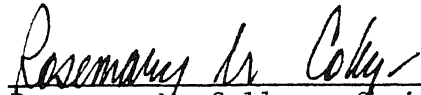
30 U.S.C. § 813(d).

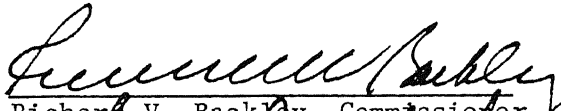
5/ Because this case involved only a request for records specifically required by the Act to be maintained, it does not present the situation faced in Sewell Coal Company, 1 FMSHRC 864 (July 1979)(ALJ). There the inspector sought to personally review accident, injury and illness and medical and compensation records at the mine. Those records were contained in individual personnel files which also contained other data not required to be maintained by the Mine Act. 1 FMSHRC at 865.

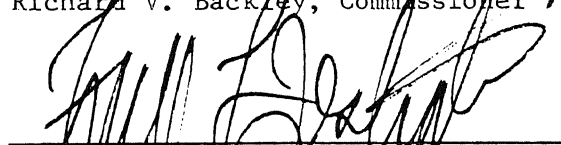
6/ We note that by their very nature section 103(g) requests and the required follow-up inspections are unpredictable. Furthermore, unless otherwise authorized, the Act prohibits giving advance notice of any inspection. 30 U.S.C. § 820(c).

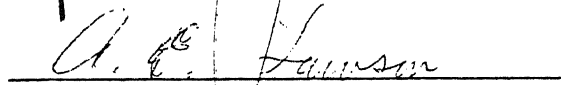
him access to the records at issue without a search warrant. We emphasize that the facts stipulated by the parties establish the reasonableness of the special investigator's conduct. He arrived at the mine during normal business hours, identified himself, explained the reasons for his inspection, and delivered a copy of the UMWA's section 103(g) request for inspection. When he was denied access to the required records, he sought guidance from his MSHA superiors before proceeding.

The decision of the administrative law judge is affirmed.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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February 21, 1984

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. PENN 82-203-R
	:	PENN 82-204-R
UNITED MINE WORKERS OF AMERICA	:	PENN 82-217
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY	:	

DECISION

This consolidated proceeding presents the question of whether violations of a mandatory safety standard, cited under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a)(Supp. V 1981), may be found to be of a "significant and substantial" nature. The Commission's Chief Administrative Law Judge concluded that significant and substantial findings could be made in a section 104(a) citation, and concluded that the violations in issue were significant and substantial. 4 FMSHRC 2093 (November 1982)(ALJ). We subsequently granted the petition for discretionary review filed by Consolidation Coal Company ("Consol"). 1/ For the reasons stated, we affirm the judge's decision.

During an inspection of Consol's Renton Mine, an underground coal mine located near Pittsburgh, Pennsylvania, Richard Zelka, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued two citations for alleged violations of 30 C.F.R. § 75.1100-3, a mandatory safety standard for underground coal mines. The portion of the standard alleged to have been violated states, "All fire fighting equipment shall be maintained in usable and operative condition." The citations were issued under section 104(a) of the Mine Act. 2/

1/ We also granted the motion of the United Mine Workers of America for leave to intervene on review.

2/ Section 104(a) states in part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to the Act has violated this Act, or any mandatory health or safety standard, rule, order or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.

30 U.S.C. § 814(a).

Inspector Zelka checked a box on each citation form to indicate that the violations were significant and substantial. 3/

The citations involved two discharged fire extinguishers. The inspector observed the first inoperable extinguisher in the mine's underground car shop. The shop is an area in the mine, approximately 16 feet by 40 feet, where mine cars are repaired. The repair work includes welding and torching, which are usually carried out on a daily basis. One car was in the shop when the inspector conducted his inspection, and he believed that it was scheduled for welding that day. The inspector observed coal dust on the car. He also observed oil and grease, as well as wood, on the floor of the shop. 4/ Two miners worked in the shop, and both were present during the inspection.

In subsequently explaining his conclusion that the violation was significant and substantial, the inspector testified that "a fire is always likely in car shops like this," and that when a fire does occur, the most important thing is to extinguish it immediately. Tr. 13. He stated that in the event of a fire, "a lot of time" would be wasted while the miners went outside the car shop to look for an operable extinguisher. Id.

Following his inspection of the car shop, Inspector Zelka proceeded along the mine's track entry. He observed another discharged fire extinguisher located on a vehicle (a trackmen's motor) that was sitting on the track. 5/ The vehicle was energized in that its trolley pole was attached to the trolley wire. The trackmen who rode in the vehicle had left it and were some distance away. Upon being questioned by the inspector, they stated that they were required to do track repair work every day and that this work normally included the cutting of rails and bolts with an acetylene torch. The inspector observed coal along the track where the men would be working. The inspector also observed grease, coal dust, and oil on the motor, particularly on the trolley pole and in the engine controller area. In addition, he noticed cutting torches on the vehicle as well as bottles containing the gas to be used in welding and torching.

3/ The box on the face of the form is followed by the legend "S AND S (SEE REVERSE)." The reverse of the form states:

Significant and substantial violations. By checking the significant and substantial block the inspector has indicated that based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Checking the significant and substantial block also means that the violation can be considered in determining whether a pattern of violations exists.

4/ The wood was used to prop up the machines while they were being repaired.

5/ A trackmen's motor is an electrically-powered, self-propelled vehicle, used to carry the miners who repair and maintain the mine tracks and their equipment and supplies. Electric current reaches the vehicle's engine when its trolley pole is in contact with trolley wires located above the track.

In explaining his notation that the violation was significant and substantial, the inspector testified that the motor could catch on fire if there were a fault in the electrical system and that a fire could start during the torch work. The vehicle was found by the judge to be "covered with grease, oil, and coal dust." 4 FMSHRC at 2096. The inspector concluded that the presence of those combustible materials could be a contributing factor to the occurrence or spread of a fire. He also stated that the chance of a fire was increased by what he characterized as a general history of trackmen's motors and similar vehicles catching on fire.

In concluding that significant and substantial findings may be included in a section 104(a) citation issued for violation of a mandatory safety standard, and that both violations were significant and substantial, the Commission judge relied on Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981). In that case, we held that a violation of a mandatory safety or health standard significantly and substantially contributes to the cause and effect of a mine safety or health hazard when "there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." 3 FMSHRC at 825. Although the citations contested in National Gypsum were issued under section 104(a) of the Mine Act, the operator in that case did not renew its challenge on review to the validity of making such findings in section 104(a) citations. Consequently, we did not review the conclusion of the judge below in that case that the practice was proper. We resolve the issue now.

It is clear that section 104(a) does not specifically require or prohibit the practice of making significant and substantial allegations on a citation issued for an alleged violation of a mandatory health or safety standard. An inspector's significant and substantial findings are, however, specifically mentioned as a prerequisite to citing violations and issuing orders under section 104(d) of the Mine Act, 30 U.S.C. § 814(d)(Supp. V 1981). 6/ Consol argues that because the phrase

6/ Section 104(d) provides as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an

(footnote continued)

"significant and substantial" is not contained in section 104(a), Congress did not intend to authorize a significant and substantial finding in conjunction with a section 104(a) citation issued for a violation of a mandatory safety or health standard. A careful reading of sections 104(a) and 104(d) convinces us, however, that this is not the case.

Section 104(a) requires that the citation be in writing and that it "describe with particularity the nature of the violation." (Emphasis added.) The "nature" of a violation refers to its characteristics and properties. Thus, when an inspector describes the nature of a violation he may articulate in writing not only the objective conditions that result in the violation, but he may also indicate, where appropriate, his subjective judgment as to its other distinguishing characteristics. That one of those characteristics may be whether the violation is significant and substantial is made clear by section 104(d)(1), which requires the inspector to determine, among other things, whether the violation "is of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." (Emphasis added.) Thus, construing sections 104(a) and (d) together, we conclude that the required description of the nature of the violation of a mandatory safety or health standard cited under section 104(a) may include a finding by the inspector that the violation is significant and substantial.

This leaves the question of whether the violations in this case were in fact significant and substantial. The judge noted the presence of combustible materials in the vicinity of both discharged extinguishers.

footnote 6 continued

unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in [section 104(c)] to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(emphasis added).

He also noted the presence of potential ignition sources at both locations, in that welding and torching were routinely done at both locations and power was going into the trackmen's motor. 4 FMSHRC at 2096. The judge found the danger of fire to be "inherent and ever present" when welding and torching are routinely carried out. 4 FMSHRC at 2097. He concluded that "injury of a reasonably serious nature becomes a reasonable likelihood when firefighting equipment such as extinguishers are not in working condition in such an environment." Id.

During the hearing, Consol sought to establish the presence of other fire extinguishers and of rock dust, which may also be used to suppress a fire, in the vicinity of both violations. The judge made no finding with respect to the existence of this firefighting equipment and material, but concluded that, even assuming their presence, a significant and substantial finding would still be appropriate. He accepted the testimony of a MSHA accident investigator Gerald Davis, that in the event of a fire, panic often was likely and that it therefore could not be assumed that a miner would attempt to obtain a second extinguisher, if the nearest one were not operable, or rock dust to fight a fire. 4 FMSHRC at 2097. 7/

As noted above, we have held that a violation is significant and substantial "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. Noting that the Act does not define "hazard," we construed the term to "denote a measure of danger to safety or health." 3 FMSHRC at 827. We stated further that a violation "'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial." Id. (footnote omitted).

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; 8/ (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. See Mathies Coal Co., 6 FMSHRC ___, FMSHRC Docket No. PENN 82-3-R, etc., slip op. at 3-4 (January 6, 1984). The third element embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not.

7/ Investigator Davis was also an electrical inspector. He had worked for MSHA in both capacities for eleven and one-half years. He was a member of MSHA's mine rescue team for fighting mine fires and explosions, and was accepted by Consol as an expert in the field of mine electricity.

8/ We note that this case involves the violation of a mandatory safety standard. We have pending before us a case raising a challenge to the application of National Gypsum to a violation of a mandatory health standard. Consolidation Coal Co., FMSHRC Docket No. WEVA 82-209-R, etc. We intimate no views at this time as to the merits of that case.

In this case, there is no dispute as to the existence of the violations. Rather, Consol argues that the inoperable fire extinguishers could not cause the feared hazard to safety--a mine fire--and thus could not pose "a significant and substantial contribution to the cause and effect of a ... mine safety ... hazard." Consol also argues that even if the cause and effect of a hazard were contributed to, there was not a reasonable likelihood the hazard would result in a reasonably serious injury. We do not agree.

With regard to Consol's argument concerning cause and effect, the causative chain of a danger in a mine may have many links. Hazards may result from the interactions of various conditions. We believe it is beyond dispute that the inoperable fire extinguishers created a major threat that a mine fire, once started, would spread or intensify without control. As the inspector testified, the most important step to take when a mine fire starts is to extinguish it immediately. If the fire fighting equipment is inoperable, such suppression may be impossible. Thus, the violations in this case presented a discrete safety hazard, i.e., propagation or intensification of a fire.

The next question is whether there was a reasonable likelihood that the hazard contributed to would result in injury. To prove this aspect of his case, the Secretary of Labor first had to establish that a fire was reasonably likely to occur, for without a fire there could be no reasonable likelihood of injury resulting from the hazard of propagation or intensification due to inoperable extinguishers. Consol argues that the evidence does not establish a reasonable likelihood of a fire. We disagree.

Substantial evidence supports the judge's findings as to the existence of combustible materials in the car shop and combustible materials on and near the trackmen's motor. Indeed, their presence was not seriously disputed. Inspector Zelka stated his opinion that a fire in the car shop was "always likely" and "could easily happen." Tr. 13, 17. He also testified that a fire was reasonably likely to occur with respect to the trackmen's motor. Investigator Davis stated his opinion that any time there is a combination of oil and grease and proximate welding and torching in a mine, the likelihood of a fire is increased. With respect to the trackmen's motor, Inspector Zelka testified that welding and torching could ignite the accumulated materials along the track and that a fault in the machine's electrical system could ignite the accumulations on the motor. Davis further testified, without dispute, that acetylene hoses could develop pin holes and that an arc or spark from the welding could ignite the acetylene coming out of the hoses. The investigator reviewed reports of previous mine fires involving similar vehicles. He stated that he found 28 such fires during 1959-1973. 9/ The informed opinions of the inspector and the investigator

9/ The mine is located in MSHA District 2. The accidents which were reported and reviewed all occurred in that district. A summary of the reports was introduced into evidence by the Secretary. This exhibit indicates that of the 28 fires listed, eight involved ignition of accumulations of combustible materials and three involved ignition of acetylene.

are an important component in determining whether there is a reasonable likelihood that the hazard contributed to will occur. See, for example, Mathies Coal Co., supra, slip op. at 5. Based upon the reasoned opinions of the inspector and the investigator, as well as the evidence of previous fires on similar equipment, we agree with the judge's findings that a danger of fire was reasonably likely at both locations.

The next question is whether there was a reasonable likelihood that such a fire, in conjunction with the inoperable fire extinguishers, would result in an injury. Both MSHA witnesses testified that in the event of a fire in the car shop, the two miners who worked in the shop would be in danger of being burned or being overcome by toxic smoke. Investigator Davis additionally testified that in such a situation, the miners might panic. 10/ Consol offered no evidence to rebut this testimony.

With regard to the trackmen's motor, Inspector Zelka testified that there was a high velocity of air in the track entry, and that if a fire occurred it would spread rapidly. He stated that the smoke would spread through the entry and that the eight miners working in by the trackmen's motor could be overcome. He also testified that the two miners repairing track might be burned. Consol's project engineer testified that the trackmen could telephone those in by and warn them of the approaching smoke and that the eight miners could then enter an escapeway and the inspector conceded the presence of telephones and escapeways between the trackmen's motor and the area where the eight men were working. However, Investigator Davis stated that in one fire he knew of, miners tried to come up the entry through the smoke rather than take the escapeway. In light of the unrebutted testimony that the extinguishers did not work, that miners were present in the car shop, on the track and in by the trackmen's motor, that mine fires may produce highly toxic fumes, and that miners in the face of fire may panic, we conclude that substantial evidence

10/ The investigator stated:

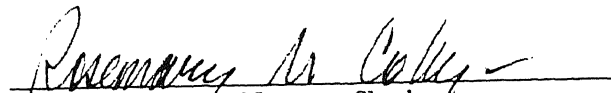
[T]he shop [has] ... two metal doors [and] ... the guy uses a fire extinguisher that does not work. The second he runs out of that door and closes the door behind him to seal the fire off... [t]here is no guarantee the other fire extinguisher that he grabs is going to work; ... [a]fter he grabs the door, after whatever length of time, the fire has already kindled to the point to a great degree of smoke, especially if there's grease and oil which gives off a ... large amount of smoke which is very toxic. The second he opened that door, the smoke would come out and hit him in the face and there's no guarantee at that point that he is even going to be able to go in there to fight the fire after you open that door. [I]t's been our experience through other accidents that a guy never does the logical.


Tr. 84.

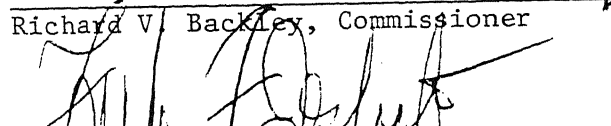
supports the judge's conclusion that there was a reasonable likelihood the hazard contributed to would result in injury. 11/

The judge also concluded that any injuries would be reasonably serious. 4 FMSHRC at 2097. Because the evidence indicates that any injuries would be caused by smoke and/or fire, substantial evidence also supports this conclusion.

For the foregoing reasons, we affirm the judge's holdings that significant and substantial findings may be made in connection with a citation issued under section 104(a) of the Mine Act for violation of a mandatory safety or health standard and that the violations in this case were significant and substantial.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner

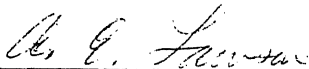

Frank F. Jestrab, Commissioner


L. Clair Nelson, Commissioner

11/ Like the judge, we are persuaded that the presence of other fire extinguishers 50 to 100 feet from the discharged fire extinguishers is irrelevant to the question of whether there was a reasonable likelihood that a fire would result in an injury. The judge stated, "Even if other fire extinguishers and rock dust were where the operator alleged they were ... there would be no guarantee that in the event of a fire a miner would go [to them]. ... [A] miner might run in the other direction and the first couple of minutes in any fire is critical with smoke the major problem." 4 FMSHRC at 2097. We note, however, that any question involving the presence of other firefighting equipment is hypothetical. Consol introduced a map into evidence which indicated the locations where other extinguishers and bags of rock dust were said to exist. The record contains testimony concerning their possible presence. However, there was no proof that any of the fire extinguishers were actually present at the locations indicated on the map, that they were operable, or that rock dust was present in usable amounts.

Commissioner Lawson concurring:

I agree with the majority as to the disposition of this case and their holding that significant and substantial findings may be made for a citation issued under section 104(a) of the Mine Act. However, for the reasons expressed in my dissent in National Gypsum, supra, I disagree with their analytical approach as set forth here and in that case.



A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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February 29, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket Nos. YORK 81-67-M
 :
v. :
 :
A. H. SMITH :
 :

DECISION

This consolidated civil penalty and contest of citation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp V 1981). At issue is an alleged violation of 30 C.F.R. § 56.5-50, a mandatory standard, regulating miners' exposure to noise, applicable to sand, gravel and crushed stone operations. 1/ A.H. Smith was issued a citation for allegedly failing to implement feasible administrative or engineering controls on a diesel shovel to reduce the shovel operator's noise exposure to within the levels required by the standard. The administrative law judge found a violation and assessed a civil penalty. 4 FMSHRC 1371 (July 1982)(ALJ). For the reasons that follow, we affirm.

1/ 30 C.F.R. § 56.5-50 provides:

(a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetallic Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

(Footnote continued)

On July 19, 1978, a Department of Labor Mine Safety and Health Administration (MSHA) inspector conducted an inspection at Smith's Brandywine Pits and Plant, a sand, gravel and concrete operation. As part of this inspection, a noise survey was conducted on a diesel-powered clam shovel. This shovel, manufactured in the 1940's and purchased by Smith in 1956, had no barrier between the operator's cab and the engine compartment, no glass in the window openings of the operator's cab, and no muffler on the engine's exhaust. The noise survey results showed that the shovel's operator had been exposed to a noise level 189 percent greater than permitted under section 56.5-50. Smith was issued a citation for violation of the standard. Based on his previous experience with other shovels, the MSHA inspector suggested to Smith that a sound absorption barrier be erected between the cab and engine compartment. Two possible methods were suggested: constructing a permanent barrier out of plywood covered with sound absorption material or installing a prefabricated sound-barrier curtain. The inspector estimated the cost of these methods as between \$100-\$300 and \$400-\$500, respectively. Smith requested the name of the supplier of the prefabricated curtain, which the inspector provided to him.

MSHA reinspected the shovel in May 1979. At that time the MSHA inspector observed that the sound-barrier curtain was installed with large gaps at the ceiling. The sides of the curtain were not attached to the shovel. A noise survey taken at that time revealed a reduction in the noise level in the cab, but a continued exposure in excess of permissible limits. Smith was informed of the need to install the curtain properly. Additionally, the inspector suggested that window glass be installed in the openings around the cab to further insulate the operator from the noise.

Fn. 1 continued

PERMISSIBLE NOISE EXPOSURE

Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1½	102
1	105
½	110
¼ or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

....

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table. [Emphasis added.]

MSHA reinspected the shovel in June 1981. At that time the sound-barrier curtain was on the floor of the engine compartment and window glass had not been installed. A noise survey established that the shovel operator remained exposed to excessive noise. The inspector issued a withdrawal order. The need for the window glass and proper installation of the curtain was reiterated, and the use of a muffler proposed. Four days later MSHA reinspected the shovel. A muffler had been added to the exhaust, but no glass was in the windows and the curtain was still improperly installed. Subsequently, for reasons not reflected in the record, the operator withdrew the shovel from use.

In his decision the Commission administrative law judge concluded that, in order to establish a violation of this standard, the Secretary carried the burden of proving an excessive noise level, as well as the technological and economic feasibility of the proposed noise controls. Because it was uncontradicted that there was excessive noise, the judge framed the issue as whether MSHA had met its burden of proving the feasibility of the proposed controls. In finding that MSHA had met its burden, the judge relied on the testimony of the inspector with respect to his experience with similar shovels. The judge found that the Secretary's evidence established that installation of the sound barrier, window glass, and muffler would have brought the shovel into compliance, and that the cost would have been \$600 or less at the time of inspection. He concluded that even if the operator's later actual cost of \$948.75 for the sound-barrier curtain were added to the inspector's "high" estimates of \$450 for muffler, glass, and labor, this sum (about \$1,400) was not an unreasonable economic burden in order to achieve full compliance with the standard. 4 FMSHRC at 1375. 2/

We granted Smith's petition for discretionary review. Subsequently, in Secretary of Labor v. Callanan Industries, Inc., 5 FMSHRC 1900 (November 1983), the noise standard at issue here was interpreted for the first time by the full Commission. The broad question before us in the present case is whether the judge's decision can be sustained in light of Callanan.

The cited standard provides that no miner shall be permitted exposure to noise levels in excess of those established by the standard. When noise levels exceed the limits established by the standard, "feasible administrative or engineering controls shall be utilized" by the operator to reduce the miner's exposure to within permissible limits. If such controls fail to reduce exposure to within permissible levels, personal protective equipment must be provided and used. In Callanan, after an extensive discussion of the history of the standard, we concluded that no special meaning was intended for the word "feasible" in this standard. We therefore used the Supreme Court's statement of the plain meaning of the word as "capable of

2/ The judge further found that MSHA's proposed use of multiple shovel operators, to reduce an individual's exposure to permissible levels, was a feasible administrative control. On review, Smith also challenges this aspect of the judge's decision. The Secretary has not addressed directly Smith's arguments concerning the alleged infeasibility of the suggested administrative controls. Because of the paucity of evidence and focused argument on this issue, and in light of the potential importance of the general question of what constitutes a feasible administrative control, we do not reach that issue in this case. Rather, because we find that the feasibility of engineering controls was established, we rest our decision on this basis alone.

being done, executed, or effected." 5 FMSHRC at 1907, citing American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 508-509 (1981). We also held that "the determination of whether use of an engineering control to reduce a miner's exposure to excessive noise is capable of being done involves consideration of both technological and economic achievability." Id. Thus, we established in Callanan that:

[I]n order to establish his case the Secretary must provide: (1) sufficient credible evidence of a miner's exposure to noise levels in excess of the limits specified in the standard; (2) sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source; (3) sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control; (4) sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a reasoned demonstration that, in view of elements 1 through 4 above, the costs of the control are not wholly out of proportion to the expected benefits. After the Secretary has established each of the above elements, the operator in rebuttal may refute any of the components of the Secretary's case.

5 FMSHRC at 1909.

In this case, the administrative law judge appropriately placed the burden of proof on the Secretary. Additionally, the first element of establishing a violation, credible proof of over-exposure to noise, was uncontroverted. The second element concerns proof of the technological achievability of the proposed engineering control. Smith, in essence, argues that MSHA itself did not know precisely what engineering controls would be sufficient to abate the violation. Smith contends that the Secretary utilized a "trial and error" approach in determining which engineering controls would abate the citation. Whatever the possible merits of Smith's "trial and error" objection to proof of a violation of the noise standard, on the facts of this case we find the argument unpersuasive. The Secretary presented credible evidence that the excessive noise levels resulted from the fact that the operator's cab was not segregated sufficiently from the engine compartment and other noise sources. The noise controls proposed by the Secretary are all basic and uncomplicated, and involve no complicated studies or experimental technology. Rather, several self-evident, readily available controls were suggested. In our view, the Secretary presented sufficient credible evidence establishing several technologically achievable engineering controls that could have been applied to Smith's equipment.

The third element of proof concerns the reduction in noise level that would be attained if the proposed controls were implemented. We conclude that the Secretary presented sufficient credible evidence in this regard. The inspector testified that he had experience with abatement of noise violations involving similar diesel shovels, using engineering controls such as those recommended in this case. Although the inspector did not predict the exact amount of noise reduction achievable from each proposed control, based on his past experience he indicated that each control would reduce the noise level

and that compliance could be achieved by a combination of the proposed controls. On this record the Secretary thus established that the proposed engineering controls would reduce the noise level.

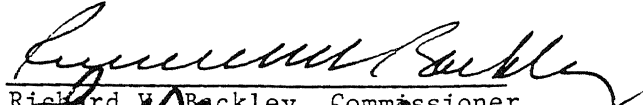
The fourth element requires proof of a reasoned estimate of the expected economic cost of the controls. In this instance, based on his previous experience the inspector was able to estimate a cost for the controls. He testified that another operator had installed a commercial sound curtain for approximately \$500. He also testified that he told Smith that two other operators had successfully built homemade barriers to bring their equipment into compliance at a cost of \$100 or less. An installed muffler was priced at between \$50 and \$100. The inspector estimated the cost for the window glass at between \$100 and \$200. Although these estimates are not documented beyond the inspector's personal knowledge and experience, we conclude that the inspector established sufficient experience with these proposed noise controls to make his testimony credible as a reasoned estimate of their cost. Smith did not rebut the testimony on the costs of glass and muffler and only demonstrated that the actual cost of the curtain, months after the inspection and original estimate, was more than predicted.


The final element of the Secretary's proof is a demonstration that the cost of the suggested controls is not wholly out of proportion to the expected benefits. Again, the facts support the conclusion that the Secretary met this burden. The estimated total cost of the engineering controls suggested by the Secretary ranged from a low estimate of \$600 or less to a high estimate of about \$1,400. The benefit to be attained from installation of the controls apparently would be full compliance with the standard by reducing the miner's exposure to noise to permissible levels. We agree with the judge that even if the higher cost estimates are used, it cannot be said that these costs are unreasonable or wholly out of proportion to the expected benefits to be attained. ^{3/} Thus, we conclude that the Secretary established a violation of 30 C.F.R. § 56.5-50.

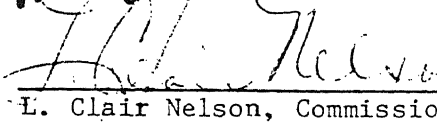
^{3/} In view of the amount of the maximum estimated costs of the engineering controls, this case also does not require us to address in detail the "prohibitively expensive" test of economic feasibility suggested by the Secretary. See Callanan, 5 FMSHRC at 1908. As in Callanan, under any reasonable interpretation of that phrase the costs of the controls at issue here can not be considered "prohibitively expensive."

Accordingly, the judge's finding of a violation and assessment of a \$300 civil penalty are affirmed.


Rosemary M. Collyer, Chairman



Richard V. Buckley, Commissioner


Frank E. Jestrab, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lawson concurring:

I agree with the majority as to the result reached and would, therefore, affirm the finding of a violation by the judge below. However, for the reasons expressed in my dissent in Callanan Industries, Inc., supra, I disagree with their requiring the Secretary to establish as part of his prima facie case the economic feasibility of technologically feasible controls.


A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 29, 1984

COUNCIL OF SOUTHERN MOUNTAINS, :
INC. :
 :
v. : Docket No. KENT 80-222-D
 :
MARTIN COUNTY COAL CORPORATION :

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The issue presented is whether the Mine Act grants to non-employee representatives of miners the right to monitor training classes for miners on mine property. A Commission administrative law judge held that such a monitoring right was impliedly conferred by the Mine Act, and that the operator had interfered with its exercise in violation of section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). 1/ We disagree. Commission recognition of the asserted right would be tantamount to amendment of the Mine Act. Accordingly, we reverse.

I.

The essential facts are stipulated or undisputed. On October 25, 1979, Martin County Coal Corporation refused to permit persons from a non-employee representative of miners, the Council of Southern Mountains, Inc. (the "Council"), to enter the property of Martin County's No. 1-S coal mine to monitor Martin County's training classes for its miners. The Council's representatives were not accompanied by an inspector nor were they participating in an ongoing inspection. The classes were being conducted pursuant to section 115 of the Mine Act. 30 U.S.C. § 825 (n. 4 infra). The Council was the authorized representative of miners, for purposes of the Mine Act, at Martin County's No. 1-S and 1-C

1/ The judge's decisions are reported at 2 FMSHRC 2829 (October 1980) (ALJ) (decision on the merits), and 3 FMSHRC 526 (February 1981) (ALJ) (award of attorney's fees).

mines, and had complied with the Department of Labor's filing requirements for miners' representatives under 30 C.F.R. Part 40. 2/

In December, as a result of Martin County's refusal to permit monitoring on October 25, the Council filed a discrimination complaint under section 105(c) of the Mine Act with the Department of Labor's Mine Safety and Health Administration ("MSHA"). MSHA investigated the complaint and on March 5, 1980, issued Martin County a citation alleging a violation of 30 C.F.R. § 48.3, which is a training regulation implementing section 115 of the Mine Act. MSHA advised the Council by letter, however, of its determination that Martin County's refusal to allow the Council to monitor training classes was not a violation of section 105(c)(1) of the Act.

On March 18, 1980, the Council was again denied permission by Martin County to enter mine property to monitor miner training classes at the No. 1-S mine. Again, the Council's representatives were not asserting any right to accompany an inspector. On the same date, MSHA issued a withdrawal order for Martin County's failure to abate the alleged violation of section 48.3. Martin County filed a notice of contest of the citation and withdrawal order. The Council, in turn, filed a discrimination complaint with the Commission, which is the subject of this case, based on Martin County's October and March refusals to allow monitoring. The complaint was filed pursuant to section 105(c)(3) because of MSHA's prior determination that Martin County's refusal to permit monitoring did not violate section 105(c)(1). Finally, MSHA filed a civil penalty petition for the alleged violation of section 48.3. The Commission's administrative law judge subsequently consolidated the proceedings.

On October 3, 1980, the Commission's judge rendered his decision concluding that Martin County had violated section 105(c)(1). He awarded the Council attorney's fees and expenses but did not, at that point, specify the sums involved. Both Martin County and the Council filed petitions for discretionary review. On November 12, 1980, we returned the case to the judge for a determination of the amount of attorney's fees. 2 FMSHRC 3216 (November 1980). On February 23, 1981, the judge awarded the Council \$14,730.51 in attorney's fees and expenses. Martin County then filed a petition for discretionary review, which we granted on April 3, 1981. The Secretary of Labor filed an amicus brief on review, and we heard oral argument in the case.

2/ Earlier, in March 1979, Martin County had also denied Council representatives permission to monitor training classes. On March 12, 1979, the Council filed a section 105(c) discrimination complaint over this incident and other aspects of Martin County's refusal to recognize the Council's status as a representative of miners. On October 24, 1979--the day before Martin County again refused the Council permission to monitor classes--the Council voluntarily withdrew its complaint pursuant to a settlement with Martin County. The withdrawal letter stated that the Council and Martin County had reached an understanding that the Council was the authorized representative of miners at the No. 1-S and 1-C mines. The letter did not mention the subject of monitoring training classes.

In his decision on the merits, the judge vacated the citation and withdrawal order alleging a violation of section 48.3. He concluded that no provision in the regulation, expressly or by implication, granted non-employee miners' representatives a right to monitor an operator's training classes. He also determined that section 48.3 reserves to the Chief of MSHA's Training Center the exclusive right to evaluate the effectiveness of operators' training programs. Neither the Secretary of Labor nor the Council sought review of this aspect of the judge's decision.

With respect to the section 105(c) violation alleged by the Council, the judge determined that the Mine Act confers on non-employee miners' representatives an implied right to monitor classes being conducted on mine property. He therefore concluded that the refusal to let the Council monitor the classes violated section 105(c)(1), because it directly interfered with the exercise of a statutory right of a representative of miners. In holding that there was an implied monitoring right, the judge stated such an "implied right to monitor training classes must be found as a part of the purposes of the Act and its provisions in general." 2 FMSHRC at 2839.

The judge observed that section 2(e) of the Mine Act provides that operators "with the assistance of miners, have the primary responsibility to prevent the existence of unsafe and unhealthful conditions and practices in the mines." 30 U.S.C. § 801(e). The judge reasoned that since miners are to assist operators in health and safety matters and may act through their representatives, section 2(e) supported representatives' active participation in operators' safety training classes. The focus of the judge's reasoning, however, was section 115 of the Mine Act.

The judge noted that section 115(a)(1) requires instruction on "the statutory rights of miners and their representatives." He stated that this provision constituted "a strong indication that the miner's representative should be present when that instruction is given." 2 FMSHRC at 2840. Additionally, the judge reasoned that section 115(b), which provides that training can be given at some place other than the mine site, was also "significant" because an "operator would have difficulty in objecting to a miners' non-employee representative coming to that site to monitor the training classes." Id. The judge also relied on section 115(c), which requires that miners be given certificates of instruction after training and that the certificates be made available for inspection at the mine. He stated that this section implied that miners' representatives, whether employees or not, would have the right to examine the certificates after training has been completed. We respectfully disagree with the judge's analysis of the statute.

II.

Neither the Mine Act nor its legislative history--nor, for that matter, the Secretary's extensive regulations implementing section 115

of the Act--refers to a right of miners' representatives to monitor training classes. This legislative silence dictates cautious review of any argument that the Commission "recognize" such a statutory right.

We do not quarrel with the general proposition that statutory rights and duties may be judicially inferred. In our opinion, however, due respect for the limits of judicial power requires that any such inference be founded on a persuasive textual or legislative indication of the intended presence of the claimed right or duty. Legislative history, for example, may unquestionably show that statutory language embraces matters not expressly stated. Indeed, we found this to be the case with regard to the right to refuse work under the Mine Act. Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2789-93 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). Different provisions of a statute, when viewed together, may clearly yield a result that neither suggests alone.

Examples could be multiplied, but we conclude that there must be a persuasive nexus between that which is stated in a statute and that which is inferred from it. Ambitious inference all too easily becomes amendment. In view of some of the suggestions made in this case, it bears restating that the Commission is an independent adjudicatory agency that exists to provide administrative trial and appellate review. The Commission is in no way part of MSHA or the Department of Labor. Our statutory mandate does not include amendment of the Act or promulgation of legislative regulations implementing it.

The right we are asked to detect is sophisticated: Non-employee miners' representatives would be empowered to enter mine property and attend the operator's training classes; there, they would monitor the operator's teaching methods and its compliance with all applicable training requirements. We do not discern a persuasive nexus between the Mine Act and this asserted private avenue to enforce its training provisions. 3/

The Act's reference in section 2(e) (30 U.S.C. § 801(e)) to "miner assistance" to operators in the prevention of unsafe and unhealthful conditions is a preambulatory statement of general "findings and purpose." As such, it does not definitively indicate whether this specific form of asserted "assistance" is implied by the Act. We cannot treat this general statement in the Act's preamble as a congressional carte blanche to engraft onto the Mine Act whatever judicial afterthought we might deem useful or expedient. As the Court of Appeals for the District of Columbia Circuit declared in a similar context:

3/ Our decision in this case is not based on any distinction between the rights of employee and non-employee miners' representatives. Rather, we distinguish only between those who would regularly and properly be scheduled to attend an operator's training session and those who would not be present without an implied monitoring right or invitation. Obviously, nothing in our holding would bar permissive or contractual attendance by any miners' representative at training classes on mine property.

The ... argument based on the language in the preamble is based on an erroneous perception of the operation and significance of such language. A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.

Association of American Railroads v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977)(footnote omitted).

Nor do we find indicia of the claimed right in section 115 itself. This section, set forth in the accompanying note, is a provision of considerable specificity. ^{4/} None of the language of section 115, however, hints at a monitoring right for non-employee miners' representatives on mine property.

4/ Section 115 provides:

(a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that--

(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

(footnote continued)

The judge stated that the requirement in section 115(a)(1) and (2) for training on "the statutory rights of miners and their representatives"

footnote 4 cont'd.

(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;

(4) any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;

(5) any training required by paragraphs (1), (2) or (4) shall include a period of training as closely related as is practicable to the work in which the miner is to be engaged.

(b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

(c) Upon completion of each training program, each operator shall certify, on a form approved by the Secretary, that the miner has received the specified training in each subject area of the approved health and safety training plan. A certificate for each miner shall be maintained by the operator, and shall be available for inspection at the mine site, and a copy thereof shall be given to each miner at the completion of such training. When a miner leaves the operator's employ, he shall be entitled to a copy of his health and safety training certificates. False certification by an operator that training was given shall be punishable under section 110(a) and (f); and each health and safety training certificate shall indicate on its face, in bold letters, printed in a conspicuous manner the fact that such false certification is so punishable.

(d) The Secretary shall promulgate appropriate standards for safety and health training for coal or other mine construction workers.

(e) Within 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977, the Secretary shall publish proposed regulations which shall provide that mine rescue teams shall be available for rescue and recovery work to each underground coal or other mine in the event of an emergency. The cost of making advance arrangements for such teams shall be borne by the operator of each such mine.

30 U.S.C. § 825.

is a "strong indication that the miner's representative should be present when that instruction is given." 2 FMSHRC at 2840. We are not persuaded. The invoked language does not invite the creation of new statutory rights. On the contrary, it is simply a direction that operators instruct miners in the rights Congress has granted them in the Mine Act. This training must be provided by operators, but it does not follow that non-employee miners' representatives are thereby discriminated against under section 105(c) when a mine operator refuses to allow them to monitor the instruction.

The judge's reliance on section 115(c) presents the same problem. Operators must provide training certificates upon the completion of the requisite instruction. The certificates shall be available for inspection in the mine. These requirements do not add up to a demonstration that non-employee miners' representatives should have overseen the instruction. In sum, we find no support for the monitoring right in the one portion of the statute where such support would be vital to judicial recognition.

As we have indicated, the legislative history affords no extrinsic evidence of a monitoring right. Congress expressed a deep concern over the problem of poorly trained miners. See, for example, S. Rep. No. 181, 95th Cong., 1st Sess. 49-51 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637-39 (1978) ["Legis. Hist."]. Congress chose to act upon this concern by passage of section 115. Other legislative responses, including provision for monitoring, could have been made but were not. Moreover, the legislative history reflects a congressional intent that training be the "business" and responsibility of operators, not of the Secretary or, a fortiori, of miners' representatives:

It is not the Committee's contemplation that the Secretary be in the business of training miners. This is clearly the responsibility of the operator, as long as such training meets the Act's minimum requirements.

S. Rep. 50, reprinted in Legis. Hist. 638. See Secretary of Labor, Mine Safety and Health Administration (MSHA), on behalf of Bennett, Cox, et al. v. Emery Mining Corp., 5 FMSHRC 1391, 1394-95 (August 1983), pet. for review filed, No. 83-2017, 10th Cir., August 17, 1983.

Recently we rejected a claim that we should recognize an implied statutory right of miners to initiate review of citations, issued by the Secretary of Labor, through the filing of a notice of contest. United Mine Workers of America v. Secretary of Labor, Mine Safety and Health Administration (MSHA), 5 FMSHRC 807 (May 1983), aff'd mem. sub nom. United Mine Workers of America v. Donovan, No. 83-1519, D.C. Cir., December 2, 1983. In the course of examining the structure of rights

granted miners in the Act, we stated, "Where Congress intended for miners to have an affirmative right under the Mine Act, it clearly provided for such." 5 FMSHRC at 815. 5/ The same notation applies in this case. Congress expressly granted miners and their representatives many valuable rights, in section 115 and in other provisions of the Act, but monitoring of mine site training classes by non-employee miners' representatives is not included among them. In the absence of any convincing implication of this asserted right in the Act and its history, we cannot presume a congressional intent that it be inferred and added to the statute.

We also have concerns as to whether, if we infer a right to monitor compliance with the Mine Act's training provisions from generalized statutory language, the monitoring right could logically be confined to section 115. If there is a right to monitor the operator's provision of training and its conformity with all training requirements, we must ask why there is not an even larger implied right of access to the mine to monitor every aspect of the operator's compliance with the Act and implementing regulations. Nothing in the Act or its history reveals that Congress intended to go so far in the direction of granting the miners' representatives private inspection authority. Thus, we must conclude that the Act does not impliedly confer upon non-employee miners' representatives the right to monitor operators' training classes on mine property. It therefore follows that an operator does not interfere with the exercise of statutory rights and does not violate section 105(c) when it refuses entry to mine property for non-employee miners' representatives to monitor classes.

5/ See, for example, section 101(a)(7), 30 U.S.C. § 811(a)(7)(transfer of miners overexposed to hazardous substance); section 103(c), 30 U.S.C. § 813(c)(requiring the Secretary to adopt regulations permitting miners to observe the monitoring or measuring of toxic materials and harmful physical agents, and to have access to the records of one's own exposure); section 103(d), 30 U.S.C. § 813(d)(interested persons' access to accident reports); section 103(f), 30 U.S.C. § 813(f)(right to accompany MSHA inspector during inspection of mine, without loss of pay); section 103(g), 30 U.S.C. § 813(g)(right to request a special inspection if there is a reason to believe that a violation or an imminent danger exists and right to obtain informal review if the inspector does not issue a citation or a withdrawal order); section 105(c)(3), 30 U.S.C. § 815(c)(3)(right to bring an independent action for discrimination before the Commission in the event that the Secretary declines to do so); section 107(e)(1), 30 U.S.C. § 817(e)(1)(right to seek Commission review of the Secretary's issuance, modification or termination of an imminent danger withdrawal order); section 111, 30 U.S.C. § 821 (right to seek compensation if idled as a result of a withdrawal order issued under certain sections of the Act); section 302(a), 30 U.S.C. § 862(a)(miners' access to roof control plan); section 303(d)(1), (f), (g) and (w), 30 U.S.C. § 863(d)(1), (f), (g), and (w) (interested persons' access to records of operator's safety and health examinations); and section 312(b), 30 U.S.C. § 872(b) (miners' access to confidential mine map).

III.

Other, more general, arguments have been pressed on review, but neither singly nor in combination do they warrant a different decisional outcome.

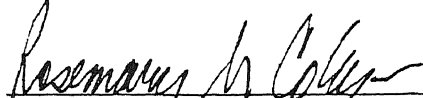
We are asked to read into the statute this asserted right as a matter of sound "policy." The Commission does have a policy-making role under section 113 of the Mine Act. 30 U.S.C. § 823(d)(2)(A)(ii)(IV) and (B). This case does not require us to describe the outer boundaries of that jurisdiction. It must be exercised, however, within the parameters of the Act and implementing regulations, as they are written. We must be faithful to the higher policy of respecting the plain demarcations of legislative and judicial responsibility under the Act.

We are urged to weigh the crucial importance of training in the effectuation of the Act's goals. Important as training is, that consideration does not justify judicial amendment of the Act. We are told that where two interpretations of the Act are possible, the one promoting safety must be favored. There is a limit to this salutary principle of construction, reached here, where the interpretation claimed to promote safety lacks a basis in the statute.

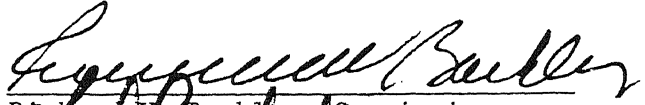
We emphasize that our holding does not deprive miners and their representatives of protection from inadequate training. Section 115 of the Act and the Secretary of Labor's comprehensive training regulations, 30 C.F.R. Part 48, require operators to file detailed training plans with the Secretary for his approval. 30 C.F.R. § 48.3(d) directs operators to furnish miners' representatives with copies of proposed training plans prior to approval by MSHA, and guarantees the representatives a right of comment on the plans. Section 48.3(k) requires that approved plans be posted at the mine for MSHA inspection and examination by miners and miners' representatives. As noted above, the Part 48 regulations do not expressly create any right of miners' representatives to monitor training classes. MSHA, however, may conduct inspections or investigations, upon a miner's complaint, of an operator's training program. 30 U.S.C. § 813(g)(1). Citations and withdrawal orders issued by MSHA can remedy any lack of compliance. 30 U.S.C. § 814. Thus, we are hard pressed to discover the glaring gap in protection and enforcement that the proponents of the claimed right allege.

IV.

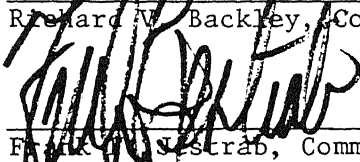
For the foregoing reasons, we reverse the judge's decision and dismiss the Council's discrimination complaint. The judge's supplemental award of attorney's fees to the Council as the prevailing party is accordingly reversed as well. 30 U.S.C. § 815(c)(3).




Rosemary M. Collyer, Chairman



Richard W. Backley, Commissioner



Frank J. Strab, Commissioner



L. Clair Nelson, Commissioner

Commissioner Lawson dissenting:

The majority's reversal of the decision below reflects a 'solution' to a nonexistent problem, contrary to the careful and legally circumspect analysis of the judge below. In this case, the authorized miners' representative 1/ seeks to monitor the mandatory health and safety training classes required to be given by the statute. Indeed, since the decision below was issued (in October 1980) these classes have been attended and observed by this non-employee miners' representative, without reported incident or disruption, and pursuant to agreement between the parties as to the limits and details of that monitoring (oral arg. 26-27, 38). No cost or prejudice to the operator has been demonstrated or will result. Even the operator is less absolutist on the right of access to these classes than is the majority, contending only for a "balancing" of rights, while acknowledging that "liberal construction" of the Act is appropriate (oral arg. 8, 54, 59). 2/

1/ It is conceded that Council of Southern Mountains (Council) has at all relevant times been certified as the miners' representative. Oral arg. 4. (Stipulation No. 1).

2/ The operator in this case was characterized by the judge below as "extremely recalcitrant," having attempted to block Council's status as the miners' representative, and then, having capitulated, immediately denying this representative the earlier disputed monitoring rights (Dec. at 1, n. 2) (Dec. 21). The prior discrimination complaint was based on a series of events between December 1978 and March 1979, during which time the operator (1) refused to furnish the representative copies of two proposed training programs, prior to submission to MSHA, contrary to the requirements of 30 C.F.R. § 48.3(d); (2) failed to note on modified programs, resubmitted to MSHA, that its miners were represented by a representative, claiming instead "non-agreement," (3) responded to the representative's request to attend classes by denying their representative status, (4) failed to respond to ten subsequent attempts by the representative to discuss the issue of attending classes, and finally, (5) failed to permit two representatives to pass through the main access road guard gate to monitor training sessions. The complaint was withdrawn when the operator agreed to recognize Council as the miners' representative and to comply with training regulations. See Exh. A through G.

There are no factual disputes in this case. No credible reason has been advanced by the majority for distinguishing between employee and non-employee miners' representatives. The majority's assertion that the mine operator may restrict attendance to "... those who would regularly and properly be scheduled to attend an operator's training session..." (slip op. at 4, n.3), but is empowered to refuse to permit non-employee representatives to attend these classes, effectively separates and distinguishes between miners' representatives. This is an obvious diminution of the participatory status of non-employee representatives, and a distinction that impermissibly lessens their statutorily authorized role. It is not disputed by the majority, and the operator concedes, that the statute which binds us makes no such distinction. Oral arg. 6. A miner's representative is a miner's representative, regardless of employee status. The Act does not limit the miners in their fundamental right to select a representative of their choice. ^{3/} As here, non-employees may be chosen, and those selected are granted no different or fewer rights than would be true if they were employees. See note 3, supra.

Phrased differently, the majority's decision must thus bar employee miners' representatives from monitoring safety and health training classes. But if an employee miner who is an employee representative, e.g., a union official, is participating in the employer's training class, nothing prevents him or her from monitoring that class for content, effectiveness, or compliance with the training program (30 C.F.R. § 48.3), and reporting those observations to fellow miners, the union or MSHA. Indeed, both in law and in fact, how could that monitoring be prohibited? It must therefore be concluded that the majority's decision is not in reality an exercise in judicial restraint, but merely an unacknowledged means of barring only non-employee miners' representatives from monitoring safety and health training instruction. This is, indeed, an impermissible amendment of the Act.

The remedial legislation we are called upon to interpret must be liberally construed, as the operator concedes, supra. Court and Commission precedent, as the judge below observed, holds that "should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety the first should be preferred." Old Ben Coal Co., 1 FMSHRC 1954, 1957-58 (1979), quoting, UMWA v. BMOA [Kleppe], 562 F.2d 1260, 1265 (D.C. Cir. 1977).

^{3/} Recognition that employees may designate their own representative has been long honored under the basic charter for employee democracy, section 7 of the National Labor Relations Act, 29 U.S.C. § 157. See Minnesota Mining & Manufacturing Co. v. NLRB, 415 F.2d 174, 177, 178 (8th Cir. 1969); Standard Oil Co. v. NLRB, 322 F.2d 40 (6th Cir. 1963); NLRB v. Deena Artware, Inc., 198 F.2d 645 (6th Cir.), cert. denied; 345 U.S. 906 (1952); Native Textiles & Communication Workers, 246 NLRB No. 38, 102 LRRM 1456 (1979); see also Consolidated Coal Co. v. MSHA, 3 FMSHRC 617 (1981).

The legislative history of the 1977 Mine Act reveals congressional acknowledgement that lack of miner training had contributed in large measure to the great loss of life in the Sunshine and Blacksville mine disasters, events which stimulated passage of this legislation, Sen. Rep. No. 95-181 at 49, Legis. Hist. at 637, and that health and safety training is essential to achieving the Act's goals. Sen. Rep. at 50, Legis. Hist. at 638. In authorizing participation by miners' representatives in inspections and in pre- or post-inspection conferences, the legislators recognized the important role of representatives in the education of miners:

It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness.

Sen. Rep. at 28, Legis. Hist. at 616.

The history also reflects an intent that miners and their representatives have maximum impact and involvement with the implementation and enforcement of the 1977 Act, including the inspection and safety training provisions, and that full participation by miners and their representatives be statutorily protected through the Act's anti-discrimination provisions:

If our national mine safety and health program is to be truly effective, the miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation....

Section 106(c) [105(c)] of the bill prohibits any discrimination against a miner for exercising any right under the Act. It should also be noted that the class protected is expanded from the current Coal Act. The prohibition against discrimination applies to miners, applicants for employment, and the miners' representatives. The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary,...

Sen. Rep. at 35, Legis. Hist. at 623. (Emphasis added.)

Congress also made clear that the anti-discrimination protection applied to implementation of the safety training provisions:

The listing of protected rights contained in section 106(c)(1) [105(c)(1)] is intended to be illustrative and not exclusive The Committee also intends to cover within the ambit of this protection any discrimination against a miner which is the result of the safety training provisions of Section 115 or the enforcement of those provisions under Section 105(f) [104(g)].

Sen. Rep. at 36, Legis. Hist. at 624. (Emphasis added.)

An expansive role for miners and their representatives in implementation of the Act was initially recognized on April 19, 1978, in one of the first "Interpretive Bulletins" issued by the Secretary:

The ... Act is a federal statute designed to achieve safer and more healthful conditions in the nation's mines. Effective implementation of the Act and achievement of its goals depends in large part upon the active but orderly participation of miners at every level of safety and health activity. Therefore, under the Act, miners and representatives of miners are afforded a wide range of substantive and procedural rights. [4/]

43 Fed. Reg. 17546 (April 25, 1978).

More directly, the Preamble to the Secretary's published regulations for implementation of section 115 of the Act states:

Numerous references to the "representative of miners" throughout the Mine Act evidence the importance of involving the miner in all aspects of mine health and safety. Nowhere does the Mine Act either explicitly or implicitly limit the participation of the representatives of miners only to the enumerated situations in the Act.... Indeed, MSHA would be remiss in attempting to fulfill its statutory obligation to insure that the training plan submitted by the operator would afford adequate training to miners if it failed to include the representative of miners in the approval process.

43 Fed. Reg. 47454, 47456 (October 13, 1978).

4/ Nowhere in this or any other Secretarial bulletin or regulation is any distinction made between non-employee and employee miners' representatives.

Contrary to the majority's contention, the absence of an express monitoring right in the statute is not dispositive of the issue before us. Congress has indicated that its listing of rights is illustrative only, Sen. Rep. at 36, Legis. Hist. at 624, supra, and that the scope of protected activities is to be broadly interpreted.

[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislatures.

Barr v. United States, 324 U.S. 83, 90 (1945). See also Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980), and cases cited.

My colleagues would also exclude from consideration the expression of congressional intent contained in the "Findings and Purpose" section of the Mine Act. Slip op. at 4. ^{5/} However, not only the Act but ample precedent makes clear the deficiencies in the majority's artificial separation of section 2(e) from the statute of which it is a part. It would appear superfluous to note that the "Findings and Purpose" section of the Act, under which 2(e) appears, represents an express statement of Congressional policy, see, e.g., Lehigh & New England Railway Co. v. I.C.C., 540 F.2d 71, 79 (3d Cir. 1976), cert. denied, 429 U.S. 1061 (1977), that is not severable from the statute. This expression of legislative policy has been described as a guide to the "public interest" that a statute addresses, McLean Trucking Co. v. United States, 321 U.S. 67, 82 (1944), ^{6/} and as a "mandate" in construing the reach of a statute, American Trucking Associations, Inc. v. Atchison, Topeka, & Santa Fe Railway, 387 U.S. 397, 412 (1967). If "[t]he purpose of Congress is the ultimate touchstone," Retail Clerks International Association v. Schermerhorn, 375 U.S. 96, 103 (1963), Congress' express statement of purpose in the 1977 Mine Act must be considered in determining the rights derived from the statute. See Whirlpool Corp. v. Marshall, 445 U.S. 1, 11-12 (1980), where the court expressly relied upon the statutory purpose and policy expressed in the preamble to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, to determine whether a right to refuse work is embodied in the legislation. Indeed, the lead decision of this Commission interpreting section 105(c) was substantially based on the conclusion that the right to refuse work, on which this Act is silent, was "necessary to fully effectuate the Congressional purpose [of the Mine Act]." Pasula, supra, at 2790.

^{5/} It is manifest that if the relevant provisions of the Mine Act were so unambiguous as to preclude reliance on the statement of purpose contained in the statute, the majority's review of the legislative history (slip. op. at 3, 7) would be equally impermissible.

^{6/} See also Wiggins Bros, Inc. v. Department of Energy, 667 F.2d 77, 88 (Em. App. 1981), cert. denied, 456 U.S. 905 (1982).

The interrelationship of the Act's various training sections, even without section 2(e), makes evident additional fallacies in the rationale of the majority. More specifically, section 2(g)(4) states that one of the major purposes of the Act is to "improve and expand ... training programs aimed at preventing ... accidents...." Further, section 104(g) of the Act provides for the mandatory immediate withdrawal from the mine of any untrained miners found therein. Sen. Rep. at 50, Legis. Hist. at 638. And section 115 of the Mine Act, "Mandatory Health and Safety Training," describes in detail the requirements for the safety training of miners.

Section 115(a) demands that "each operator of a coal or other mine shall have a health and safety training program...." (Emphasis added.) The majority's characterization of these classes as "the operator's," is thus misleading, since Martin County's duty to instruct is neither personal nor "private." In truth, both the classes, and any monitoring thereof, are for a statutory purpose, and charged with that legislatively expressed public concern.

Section 115(a) of the Mine Act also states that training classes "... shall include instruction in the statutory rights of miners and their representatives." (Emphasis added.) Notwithstanding, the majority would bar these admittedly statutorily indistinguishable miners' representatives (oral arg. 16), from observing instruction on the "statutory rights" of these very representatives. It would appear obvious that miners' representatives would, indeed must, be present when that instruction is given, if section 115 is to be meaningfully implemented.

Section 115(b), moreover, provides for training classes to be held at locations other than the mine site. Although the operator itself presented the classes in this case, the training required by the statute may be satisfied with instruction by non-operator personnel at, e.g., local public colleges or universities. 30 C.F.R. § 48.4(a). Cf. Bennett v. Emery Mining Co., 5 FMSHRC 1391 (1983), appeal filed, No. 83-2017 (10th Cir. Aug. 17, 1983). The operator was unable to articulate any basis under the Act, or in law, which would permit it to bar miners' representatives from those classes held away from the mine site, admittedly non-hazardous locales. (Oral arg. 10-12). Indeed, the statute reveals none. One searches in vain to discover statutory--or other--support sanctioning restrictions by an operator on a public educational institution's admission policy.

Section 115(c) requires that miners who have received the mandatory safety and health training not only be given certificates of instruction after completion thereof, but that these certificates be made available for inspection at the mine site. If the training certificate is to be meaningful, the training given must be open to evaluation. Monitoring of the training process, designed to enable miners to work safely and survive in this most dangerous of industries, is crucial, indeed, indispensable, to the "business of training miners." Sen. Rep. at 50, Legis. Hist. at 638.

It would also be impossible for the miners' representative to exercise its undisputed right to propose revisions to safety and health training plans, undeniably granted by 30 C.F.R. § 48.23, if it is unable to monitor and intelligently evaluate that training. Certainly miners' representatives can hardly be expected to receive, much less benefit from, this required instruction on their rights, if they are to be barred from these classes. Under the reasoning of the majority, newly hired miners, who have never seen the inside of a mine, would be required to determine on their own whether the training received satisfied the statutory criteria of section 115 and the training regulations contained in 30 C.F.R. Part 48, and then relay their observations to their representative. The miner is, after all, being trained, and if he or she were knowledgeable about the safety and health instruction being presented, there would obviously be no need for the training. Indeed, the asserted possibility of confusion, misinformation or disruption--admittedly totally without record support (oral arg. 57)--would be maximized, not minimized, by barring access to this safety and health training. This is surely contrary to both the language of section 115 and the goal of the safety and health instruction being presented.

The instructors of these mandatory safety and health classes may also have their approval as instructors revoked by MSHA for "good cause." 30 C.F.R. § 48.3(i). It would appear beyond argument that the miners' representative, if permitted access to these classes, would be in the best position to demonstrate "good cause," if any revocation were to be sought of an instructor's teaching approval certificate.

It is thus essential, as the Secretary agrees, that representatives be able to monitor the training being given, in order to effectuate these several statutory rights. (Oral arg. 39-42.) Absent miner monitoring, it strains credibility to believe, for example, that an operator will enthusiastically instruct its employees on the right to refuse work. As Phillips v. Board of Mine Operations Appeals, 500 F.2d 772, 778 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975), instructs us: "The miners are both the most interested in health and safety protection, and in the best position to observe the compliance or noncompliance with safety laws."

The majority contends that the miners' representative is asserting a "private avenue" or is acting as a "private attorney general" to enforce the training provisions of the Act. Slip op. at 4, 8. It is scarcely necessary to observe that no recompense is claimed by, nor will any accrue to this miners' representative if it were to monitor these mandated safety and health classes. Moreover, in contrast to the active intrusion legislatively [and judicially--UMWA v. FMSHRC, 671 F.2d 615 (D.C. Cir.), cert. denied sub nom. Helen Mining Co. v. Donovan, 51 U.S.L.W. 3288 (U.S. Oct. 12, 1982), corrected, 51 U.S.L.W. 3300 (U.S. Oct. 19, 1982)(No. 82-33)--] granted to miners who not only accompany federal mine inspectors to assist in searching out safety and health hazards, but are paid by the mine operator for their time, the passive "intrusion" here is truly de minimis. 7/

The right of access to training classes for miners and their chosen representatives, whoever they may be, is thus amply implied, if not explicitly required by, the Act. The Act is also silent as to the right of a miner to refuse work in unsafe conditions. Nonetheless, that most fundamental right has, as the majority concedes, been determined to be implicit in section 105(c) of the 1977 Mine Act, Pasula, supra, as well as under section 110(b) of the 1969 Act, 30 U.S.C.A. 820, under language significantly narrower than that of the 1977 Act: 8/

Nothing in the 1969 Mine Safety Act or mine procedure suggests that the company has a right to fire a miner for refusing to work in a particular area of a mine when he fears a chronic, long-term threat to his health or safety there due to safety violations.

7/ The majority, although never directly, apparently approves this operator's shopworn contention that its property rights outweighs the duty of the operator to provide accessible safety and health training. This Commission has previously held that non-employee miners' representatives have access to mine property for walkaround inspection purposes. See Consolidation Coal Co. v. MSHA, supra note 3. It would also appear beyond serious question that a non-employee miners' representative could have monitored any of these classes under section 103(f) of the Act if an MSHA inspector had asked the representative to accompany him. Dec. at 9.

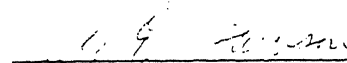
8/ Section 110(b)(1) states:

No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

Phillips, 500 F.2d at 780. Congress thereafter explicitly confirmed that right under the 1977 Mine Act, specifically approving Phillips. Sen. Rep. at 36, Legis. Hist. at 624. The final and definitive ruling on that implicit right, under comparable statutory language, was set forth by the Supreme Court in Whirlpool Corp. v. Marshall, supra.

Finally, although given their disposition of this case the majority does not reach this issue, it is clear that if the right exists to monitor these classes, this operator has interfered with the exercise of that right, and that interference is prohibited by section 105 of the Act. Sen. Rep. at 35-6, Legis. Hist. at 623-24. 9/ The essence of the discrimination here is this operator's treatment of this non-employee miners' representative in a manner that it would not, and indeed could not, for the reasons stated, impose on an employee miners' representative. See Consolidation Coal Co. v. MSHA, supra note 3.

I therefore dissent, and would affirm the judge below.


A. E. Lawson, Commissioner

9/ As Pasula makes clear, it is not necessary that discriminatory action be premised on a violation of a specific statutory right or administrative requirement.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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February 29, 1984

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 80-31-DM
v.	:	
	:	
METRIC CONSTRUCTORS, INC.	:	

DECISION

This case involves a complaint of discrimination filed by the Secretary of Labor with this independent Commission pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The complaint alleged that Metric Constructors, Inc. ("Metric"), violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1) (Supp. V 1981), when it terminated the employment of seven of its workers following their refusal to perform certain work that they believed was hazardous. A Commission administrative law judge concluded that the terminations were discriminatory, awarded back pay with interest to six of the seven complainants, awarded hearing expenses to five of the seven, and assessed a civil penalty of \$1,000 for the violation of section 105(c)(1). 4 FMSHRC 791 (April 1982)(ALJ). We subsequently granted petitions for review filed by Metric and the Secretary, and we heard oral argument. For the reasons set forth below, we affirm the judge's finding of a violation of the Mine Act and his assessment of a civil penalty. However, we remand certain aspects of his remedial awards.

I.

Metric, a subcontractor, was engaged to do repair work at a cement plant owned by Florida Mining and Materials Corporation near Brooksville, Florida. Beginning on February 27, 1979, the kiln and the preheater at the plant were taken out of service so that repair work could be done. Much of the repair work involved welding. The seven complainants, all welders, were hired on a temporary basis to do the work. 1/ It was agreed they would work 12 hours per day, seven days per week, for approximately four weeks beginning February 27, 1979. It was also agreed that they would work a night shift, from 7:00 p.m. to 7:00 a.m.

1/ The complainants are: Joe Brown, Johnny Denmark, David Mixon (deceased), the McGuire brothers (Jerry and Terry) and the Parker brothers (John and Wes).

On the nights of February 27, 28, and March 1, 1979, the complainants worked on and around the kiln. On the night of March 2, they were assigned to weld vortex ducts, i.e., air intakes, on the pre-heater, a tall, smokestack-like structure. Their work area was approximately 180 feet above the ground. The judge has accurately described the crucial events.

The seven Complainants proceeded with Night Foreman Davis to inspect their working area by climbing a set of stairs to it. Their working area was pointed out by Bob Davis from a platform. The Complainants could not reach it, however, because there was a gap of at least 6 to 8 feet between the platform where they were standing and the actual working area.

It was then determined that four of the Complainants (Joe Brown, Terry McGuire, Jerry McGuire and John Parker) would weld on the duct work, while the other three would pull leads (power supply for the welding machines) and act as relief when the welders got tired. Since there was no direct access to the duct work, the four welders were lifted to the work site in a basket by a crane. The other three Complainants pulled leads to within 6 to 8 feet of the duct work and stood on a platform handing supplies to the welders as needed. The platform had no fence or handrail around it. Once the four Complainants reached the duct work in the basket, they found there were no scaffolding or handrails around the work site nor were there any padeyes on which to hook their safety belts. [2/] They were thus required to weld padeyes before they could attach their safety belts. Terry McGuire and Joe Brown went inside the [duct] ... that was being welded onto the pre-heater, while Jerry McGuire went on top of the duct, and John Parker worked from an unsecured one-board scaffold below the duct.

The four Complainants ... worked for approximately 2 hours under conditions which they considered unsafe. Jerry McGuire, who was on top of the duct, was being blown about by heavy winds. John Parker, who was below the duct on the one-board scaffold, was being "burned" by the welding fire from above as were Terry McGuire and Joe Brown inside the duct. The lighting at the work site was insufficient and by 7:30-8:00 p.m. on March 2, 1979, it was dark outside. The four welders working on the duct were able to reach the platform where the other three were standing only by walking around on a ring which encircled the pre-heater.

2/ A padeye (or pad eye) is a plate with a round opening, usually welded or fixed to a structure, to which safety belts or lines may be attached.

Shortly after 9:00 p.m., all seven Complainants went on break. They decided that because of what they believed to be unsafe and hazardous working conditions Terry McGuire and Joe Brown would talk to Bob Davis about improving the conditions by getting additional lights, fire blankets, scaffolding, cables for handrails and jacks for scaffolding board at the work site.

Once on the ground, and after their break, Joe Brown, Terry McGuire and Jerry McGuire, on behalf of all seven men sought out Night Foreman Bob Davis and registered their complaints about the unsafe and hazardous working conditions, i.e., no handrails, no scaffolding, and no lights and to request angle irons, scaffold jacks, scaffold boards, fire blankets, cable for handrail and lighting. While they were so engaged, the other four Complainants returned to the platform located 6 to 8 feet from the duct.

4 FMSHRC at 793-795 (transcript citations and footnotes deleted).

Following the complaints, Foreman Davis went to the office trailer where he told Thelbert Simpson, the night superintendent, that the complainants wanted a scaffold and handrails before they resumed welding. Davis and Simpson agreed to call Russ Jones, the project superintendent, who was not on the job site. Simpson called Jones, and told him that the complainants refused to continue working on the pre-heater. Jones asked if Simpson had any other work for them. Simpson said that he did not, and Jones responded that the complainants should go home and come back in the morning for their pay. Simpson apparently did not tell Jones why the complainants refused to work.

Simpson then told Brown and the McGuire brothers that Jones had said to go home and to come back in the morning for their pay. The employees asked if there was other work for them to do on the ground and Simpson said there was not. They asked if they were being fired, and Simpson said they were not. Davis told the employees that Jones had said they would have to continue welding as before. He also told them that if they refused they would have to go home, and that they could come back in the morning and get their money.

Following this conversation, the employees went home. They returned the next morning to collect their pay. Each was asked to sign a slip which indicated that they had voluntarily quit, and each refused. That same morning other welders, who had been hired along with the complainants, were assigned to do the welding on the pre-heater. That work was completed three or four days before the end of the four-week work period of employment at the cement plant.

In his decision below, the Commission's administrative law judge found that the conditions under which the employees were asked to work were in fact unsafe. He also concluded that they engaged in a work refusal that was "reasonable and fully justified by the circumstances." 4 FMSHRC at 802. Metric asserted, in defense of its termination of the complainants, that it too had a reasonable belief--that the conditions of employment were safe. Metric argued that because it had no duty to change the conditions to the employees' satisfaction and because no other work was available for the employees to do, it had no obligation to continue to employ them. The judge found, however, that

Metric's argument that it reasonably believed the conditions were safe was undermined by its failure to investigate the conditions and by Simpson's failure to advise Jones of the reason why the men refused to work. 4 FMSHRC at 802. 3/ Consequently, the judge concluded that Metric's decision that the men could either work under the unsafe conditions or have their employment terminated was equivalent to discharging them for engaging in protected activity. 4 FMSHRC at 803-04. The judge awarded back pay and hearing expenses, and assessed a civil penalty for Metric's violation of the Mine Act.

II.

The Violation of Section 105(c)(1)

Metric argues that the judge's finding of a violation is at odds with the scheme and policies of the Mine Act. According to Metric, the result of the judge's decision is that an operator must continue to employ and pay miners who exercise a protected right to refuse work, even though there is no alternative work for them to do, unless the operator reasonably believes that working conditions are safe. Metric asserts that this transforms the right to refuse work into a mechanism for coercing compliance with safety standards. Metric argues, as it did before the judge, that it owed no duty to its employees to ensure that the conditions were safe or to believe that they were safe. Thus, Metric submits that in the absence of alternative work, it had no obligation to keep the complainants on the payroll.

We have held that a miner's work refusal is protected under the Mine Act if the miner has a reasonable, good faith belief in a hazardous condition. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). See also Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982). In this case, the judge found that conditions on the night of March 2, 1979, resulted in an unsafe working environment and that the complainants had a reasonable belief this was the case. Substantial

3/ Foreman Davis died before the hearing. In a statement taken before his death, Davis asserted that he, rather than Simpson, called Jones and told him of the safety complaints. The statement was made to the Department of Labor's Mine Safety and Health Administration and was offered into evidence by the Secretary. Metric asserts that the judge erred, to its prejudice, by treating the statement of Davis as testimony introduced on Metric's behalf that created a conflict between Metric's witnesses.

Although the judge referred to Davis' statement several times and noted that it conflicted with Simpson's and Jones' testimony in respect to what Jones was told, he ultimately discounted the statement and credited the testimony of Simpson and Jones. 4 FMSHRC at 800-01 n.5. Thus, although the judge may have been imprecise or mistaken in referring to a conflict in the testimony of Metric's witnesses (4 FMSHRC at 795 n.4, 801 n.5)) we do not believe Metric was thereby prejudiced. Moreover, and more important, the judge's conclusions as to the fundamentals of the violation are supported by the record without reference to Davis' statement.

evidence supports these findings, and Metric does not contest them on review. There is no hint in the record that the employees fraudulently expressed a fear of the working conditions. Because they shared a reasonable, good faith belief that their working environment was unsafe, their work refusal was protected under the Act. See Robinette, supra.

A complainant establishes a prima facie case of discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by the protected activity. See, for example, Hollis v. Consolidation Coal Co., 6 FMSHRC _____, Docket No. WEVA 81-480-D, slip op. at 5-6 (January 9, 1984), and cases cited. In cases involving a miner's work refusal, one of the factors which may be considered in determining the intent behind the adverse action is the reasonableness of the operator's reaction to the work refusal.

We have held that a miner refusing to work on the basis of a good faith, reasonable belief in a hazard "should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the ... hazard at issue." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982). A corresponding rule of reason applies to the operator's response as well. Thus, as we recently stated, "Once a reasonable good faith fear in a hazard is expressed by the miner, the operator has an obligation to address the perceived danger." Secretary on behalf of Pratt v. River Hurricane Coal Co., Inc., 5 FMSHRC 1529, 1534 (September 1983). See also Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-99 (June 1983). If an operator precipitately disciplines a miner, without attempting in any manner "to address the perceived danger," it does so at its own legal risk if it is later determined in litigation under the Act that the work refusal was protected.

The judge's decision accords with these general principles. The judge found that Metric did not reasonably believe that the working conditions complained of were safe. The evidence in this record as to the hazardous nature of the conditions is strong. Metric presented no evidence from which it could be concluded that it reasonably believed the hazards did not exist. Nor did Metric's supervisory personnel take any action which implied that they reasonably believed the conditions were not hazardous. As the judge noted, none of Metric's personnel investigated the complaints to determine their validity, and Simpson did not even advise the project superintendent that the safety complaints had been made. 4/

4/ Metric argues that its termination of the employees' could not have been motivated by their protected safety complaints because Project Superintendent Jones, who made the decision to terminate, was not told of their protected activity. It is clear, however, that Night Superintendent Simpson knew why the men were refusing to work. An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions. See, for example, Allegheny Pepsi Cola Bottling Co. v. NLRB, 312 F.2d 529, 531 (3rd Cir. 1962). Accordingly, the fact that Night Superintendent Simpson did not communicate the miners' safety concerns to Project Superintendent Jones cannot serve to insulate Metric from liability for this unlawful discharge.

We conclude that substantial evidence supports the judge's finding that Metric did not have a reasonable belief that the conditions were safe when it offered the complainants the option of either working under those conditions or of not working at all. Moreover, even if Metric's belief in the safety of the working conditions were a reasonable one, we find compelling the lack of an affirmative response by Metric to the complainants' concerns under these circumstances. Miners have been accorded the right to refuse work under the Act in order to help achieve the goal of a safe workplace. Pasula, 2 FMSHRC at 2790-93. If an operator may take action which adversely affects miners when it does not have a basis for a reasonable belief that the complained-of conditions are safe, and without addressing the miners' fears, the exercise of the right to register safety complaints and to refuse work will be chilled. Here we endorse the judge's view that "where the mine operator's belief that the working conditions are safe is unreasonable and the miners' belief that such conditions are unsafe is reasonable, the discharge of complaining miners for such work refusal is discriminatory and a violation of the Act." 4 FMSHRC at 804. Accordingly, we affirm the judge's conclusion that the termination of the employees violated section 105(c)(1) of the Act. 5/

III.

The Remedies

Back pay--mitigation

At the hearing, Metric attempted to establish that several of the discharged employees had failed to mitigate their loss of pay by refusing to search for other employment. The judge held that when an employer raises such a defense, the discriminatees are required to establish that they at least engaged in "reasonable exertions" to find employment. 4 FMSHRC at 805. Counsel for the Secretary of Labor argues that to establish a mitigation defense, an operator must prove not only that the employee did not make the required reasonable efforts, but also that an employee could have obtained suitable employment. We do not agree.

Because the Mine Act's provisions for remedying discrimination are modeled largely upon the National Labor Relations Act, we have sought guidance from settled cases implementing that Act in fashioning the contours within which a judge may exercise his discretion in awarding back pay. Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982); Dunmire and Estle, supra, 4 FMSHRC at 142. Back pay may be reduced where a miner

5/ Metric contends that the record supports a finding that the complainants were terminated because there was no alternative work for them when they refused to do the work assigned them. Given our disposition of the case, we need not and do not at this time decide questions pertaining to the relationship between the availability of alternative work and the validity of discipline over a work refusal. Metric also complains of the judge's assessment of a civil penalty. In affirming the judge's finding of a violation, however, we affirm his penalty assessment as well. The Act requires a penalty where there has been a violation. We conclude that the judge's findings with respect to the statutory penalty criteria are supported. 30 U.S.C. § 820(i)(Supp. V 1981).

fails to mitigate damages, for example, by failing to remain in the labor market or to search diligently for alternative work. Dunmire and Estle, 4 FMSHRC at 144. However, we conclude that when such diligence is lacking, the operator should not also be compelled to shoulder the additional burden of establishing that suitable interim employment could have been found. The employee must reasonably search for a suitable alternative job; where he does not, the existence of the alternative work is irrelevant. See, for example, NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1317-19 (D.C. Cir. 1972).

With respect to James Parker, the judge denied back pay on the basis that Parker's testimony established a failure to make reasonable efforts to obtain other employment. Parker's testimony shifted. He initially stated that after he was terminated by Metric on March 2, 1979, he first applied for other work in July 1979. I Tr. at 200. He then stated that the period in which he did not look for a job was only a month, or three to four weeks. I Tr. at 204. Finally, he stated that he sought another welding job on March 5, 1979. I Tr. at 211-213. The judge accepted Parker's initial statement and found the other testimony "not sufficiently trustworthy." 4 FMSHRC at 807 n. 12. Where a judge's finding rests upon a credibility determination, we will not substitute our judgment for his absent a clear indication of error. The shifting nature of Parker's testimony leads us to agree with the judge that Parker failed to make reasonable efforts to find other employment after being discharged. The denial of back pay with regard to Parker is affirmed.

The judge also denied one week of back pay to Joe Brown. He concluded that Brown did not make reasonable efforts to seek suitable alternative employment during the week following the termination of his employment with Metric. 4 FMSHRC at 806. A discriminatee must make "reasonable efforts" to find other employment. OCAW v. NLRB, 547 F.2d 598, 603 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977). The determination as to what constitutes a reasonable effort is made on the basis of the factual background peculiar to each case. See NLRB v. Madison Courier, Inc., 472 F.2d at 1318. Here John Parker, James McGuire, and Terry McGuire all sought employment within one to three days of the loss of their jobs. 4 FMSHRC at 806, 809 and 810. This factor is helpful in determining what could reasonably be expected of Brown. Brown's failure to make comparable efforts or to offer any explanation as to why he was unable to do so supports the judge's conclusion that he made no responsible effort to find alternative employment following the loss of his job. We are not prepared to say that the judge erred in denying Brown one week of back pay. Our decision is restricted to the facts of this case. We are not intimating that a failure to seek alternative employment for one week after an unlawful termination is per se unreasonable. 6/

6/ Counsel for the Secretary argues that Brown's failure for one week to seek other employment does not establish that his efforts were unreasonable. Counsel notes that in Dunmire and Estle, supra, we found that complainant Estle made reasonable efforts to mitigate his loss of income. 4 FMSHRC at 130, 144. However, unlike Brown, Estle sought to be reinstated the first working day after he was discharged. 4 FMSHRC at 130. Moreover, in this case, unlike Dunmire and Estle, detailed evidence concerning mitigation and what others did to try to find suitable alternative employment was introduced. Also, of course, complainants' jobs with Metric were only scheduled to last for four weeks.

The judge awarded full back pay to David Mixon and Johnny Denmark, although neither appeared at the hearing. 4 FMSHRC at 808-09. Mixon died one month before the hearing, and Denmark was overseas serving in the Navy. Metric, which elicited its evidence with respect to mitigation through the cross-examination of the complainants who testified, consequently had no evidence to present with regard to whether Mixon or Denmark failed to mitigate their losses. The judge found that Metric did not establish a lack of reasonable effort by Mixon and Denmark to find suitable alternative employment and awarded both full back pay. 4 FMSHRC at 808-09.

The judge did not err. The operator bears the burden of proof with respect to willful loss. OCAW v. NLRB, 547 F.2d at 602-03. We recognize that there are circumstances, such as those at hand, under which a complainant may not appear to testify. However, an operator may prepare for that possibility by initiating pre-trial discovery relating to the issue of mitigation. Significantly, although Metric submitted two sets of interrogatories to the Secretary of Labor and one request for production of documents, none of the questions asked or the items sought related to the issue of mitigation. Nor did Metric seek to depose either Mixon or Denmark prior to the hearing. We therefore affirm the judge's conclusion that Metric failed to establish a willful loss of earnings with respect to Mixon and Denmark and his conclusion that both were entitled to full back pay.

Overtime compensation

In his post-hearing brief, the Secretary of Labor requested overtime pay in the amount of time and a half for each hour over 40 hours per week that would have been worked absent the discriminatory discharges. The judge concluded that the record lacked an evidentiary basis for such an award. 4 FMSHRC at 806. Our duty is to restore the discriminatees to the enjoyment of the wages they lost as a result of the illegal terminations. We are mindful of the fact that the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq. (1976 & Supp. V 1981) ("FLSA"), requires compensation for each hour worked over 40 hours per week at one and one half times the regular rate of pay for certain classes of employees and employers. 29 U.S.C. § 207 (1976 and Supp. V 1981). As counsel for the Secretary has noted, this statutory obligation is a part of every employment contract between an employee and an employer subject to the terms of the FLSA. See, for example, Roland Electric Co. v. Black, 163 F.2d 417, 426 (4th Cir. 1947), cert. denied, 333 U.S. 854 (1948). While we understand the judge's concern over the lack of specific evidence on this point, we cannot ignore the possibly applicable mandates of the FLSA.

We remand in order to permit the parties, on an expedited basis, to address this issue more fully. If the judge on remand determines that the FLSA applied to Metric, the back pay award in this case should reflect inclusion of the necessary overtime pay. 7/

7/ We leave undisturbed the judge's assessment of interest on the back pay awards at the rate of 12% per annum compounded annually from March 3, 1979, until paid. Barring an abuse of discretion in the assessment of interest by a judge, we will not in this case retroactively implement our recently announced prospective policy for the computation of interest based upon use of the IRS "adjusted prime rate." Secretary on behalf of Bailey v. Arkansas-Carbona Co., 6 FMSHRC 2042, 2049-54 (December 1983).

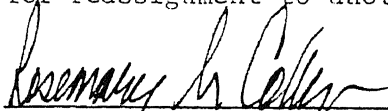
Expenses

The judge awarded the complainants, on an individual basis, \$125.00 in expenses for each day they attended the hearing. 4 FMSHRC at 810-11. The judge concluded the daily amount of \$125.00 was "fair [and] reasonable." 4 FMSHRC at 811.

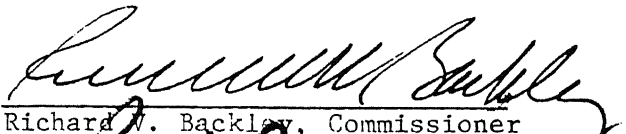
Recovery of expenses incurred in bringing a successful claim may be part of the relief necessary to make a discriminatee whole. Northern Coal, 4 FMSHRC at 143-44. The burden of establishing a claim for expenses is upon the Secretary. It is he who must introduce sufficiently detailed evidence so that a determination may be made whether the complainants' claims are justified. When he does not do so and when, as here, the judge's award is without record support, we have no basis for meaningful review. We therefore vacate the award of expenses. However, in view of the statutory duty to make these miners whole, we remand in order to afford the parties the opportunity to submit evidence concerning the appropriate amount, if any, of the expenses to be awarded the complainants.

IV

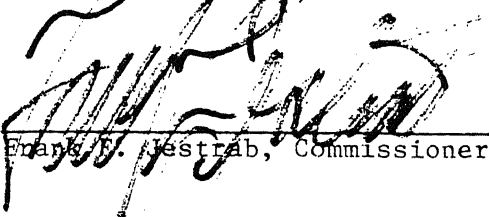
For the foregoing reasons, the judge's finding of a violation and assessment of a civil penalty are affirmed. The award of expenses is vacated, and the matter is remanded for expeditious reconsideration of that issue. The back pay awards are also remanded for expeditious determination of whether overtime pay, pursuant to the FLSA, should be included in the award. The judge who decided the case below is ill, so the proceeding is remanded to the Chief Administrative Law Judge for reassignment to another judge.



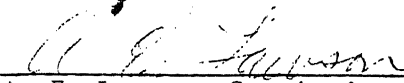
Rosemary M. Collyer, Chairman



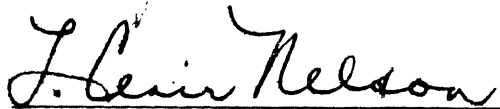
Richard W. Backley, Commissioner



Frank F. Vestrab, Commissioner



A. E. Lawson, Commissioner



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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

FEB 1 1984

HELVETIA COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. PENN 83-117-R
	:	Order No. 2015555; 2/28/83
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Lucerne No. 8 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 83-153
Petitioner	:	A.C. No. 36-04597-03511
v.	:	
	:	Lucerne No. 8 Mine
HELVETIA COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: William M. Darr, Esq., Indiana, Pennsylvania,
for Contestant/Respondent;
David T. Bush, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent/Petitioner.

Before: Judge Broderick

STATEMENT OF THE CASE

The above proceedings have been consolidated for the purposes of hearing and decision, because the order contested in the contest proceeding charges a violation of a mandatory safety standard for which the Secretary seeks a penalty in the penalty proceeding.

At the hearing, the parties stipulated that the violation charged in Order of Withdrawal No. 2015555 occurred, that it was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard, and that it was based on an underlying citation properly issued under section 104(d)(1) of the Act.

Pursuant to notice, the case was heard in Indiana, Pennsylvania, on December 20, 1983. Roy Craver, Thomas Grove and Harry Losier testified for the Secretary of Labor; David Duplin, Albert Cribbs and Robert D. Anderson testified for Helvetia. The parties waived their right to file posthearing briefs, and each made oral argument on the record at the conclusion of the hearing. Based on the entire record and considering the contentions of the parties, I make the following decision.

ISSUES

1. Was the violation of 30 C.F.R. § 75.200 charged in Order No. 2015555 caused by an unwarrantable failure of the operator to comply with the mandatory standard in question?

2. What is the appropriate penalty for the violation?

FINDINGS OF FACT

1. At all times pertinent hereto, Helvetia owned and operated the subject mine from which it extracted coal.

2. Helvetia produced 2,579,824 tons of coal annually, of which the subject mine produced 533,139 tons. Companies affiliated with Helvetia produced an additional 3,994,031 tons annually.

3. In February 1983, a large caved area existed in the 6 Butt intake escapeway of the subject mine. The area was 14 feet wide and almost 20 feet long. The cave height was more than 69 inches, whereas the coal seam averaged approximately 48 inches high.

4. The cave-in had occurred 1 year or more prior to February 28, 1983. There was a fault condition running through the roof in the area.

5. The roof in the area had been supported by 4 foot resin bolts.

6. On February 25, 1983, at about 4:30 p.m., assistant mine foreman Albert Cribbs examined the intake escapeway in the 6 Butt section of the subject mine from outby in, and traversed the cave area. He placed his initials on both the outby and inby side of the cave and noted in the weekly air course inspection book that the area was in a safe and lawful condition.

7. On February 27, 1983, Federal Mine Inspector Roy Craver commenced an inspection at the subject mine. He entered the mine at approximately 11:45 p.m. The crew working on the 6 Butt section entered the mantrip at about 12:01 a.m., February 28, 1983.

8. The inspector went to the 6 Butt intake escapeway with the miners' representative and walked 300 to 400 feet to the cave area. He noted the initials A.C. and the date February 25, 1983. The inspector also noted four treated timbers lying along the right rib inby the cave, and two loose timbers in the cave area, also lying along the right rib.

9. The inspector found unsupported roof in the cave area measuring approximately 14 feet by 20 feet. There was loose overhanging rock on the outby end of the cave, but the roof itself was solid. Only two timbers were set along the side and they were 20 feet apart. Coal was not being mined at the time. The last coal producing shift was Friday afternoon, February 25.

10. I find that at the time of Cribbs' weekly aircourse examination on February 25, 1983, the six posts found lying on the floor February 28, appeared to be properly set in the cave area. The escapeway was not more than 6 feet wide between supports, and the posts were set on 5 foot centers. No hazardous conditions were observable in the roof at that time.

DISCUSSION

The Secretary takes the position that it would not have been possible for the posts to have fallen out between Friday night and Monday morning, under the circumstances present in this mine where the roof had been bolted with resin bolts and the cave-in had taken place more than 1 year earlier. While I concede that settling or shifting of the caved area is unlikely under the circumstances, I accept the testimony of Mr. Cribbs as to his examination on February 25. I find no possible motive for him to have made a false report of such a highly dangerous condition. To have falsified the report would have jeopardized his job and reputation. More importantly, it would have jeopardized miners' lives including his own. The record does not permit me to conclude that he was that reckless. Cribbs testified, and I find, that there was loose material on the floor of the cave which may have made it difficult to obtain solid footing for the posts. I find that the posts were dislodged over the weekend by natural causes.

11. The condition was abated by the setting of six timbers in the cave area. Two additional timbers were also set. The order was terminated at 2:30 a.m., February 28, 1983.

CONCLUSIONS OF LAW

1. Helvetia was subject to the provisions of the Federal Mine Safety and Health Act of 1977, in the operation of its Lucerne No. 8 Mine.

2. The violation charged in Order of Withdrawal No. 2015555 issued February 28, 1983, did in fact occur.

3. Helvetia is a large operator. There is no evidence concerning Respondent's history of prior violations. The penalty assessed herein will reflect my conclusion as to Helvetia's size. It will not be increased on the basis of prior history.

4. The violation was abated in a timely fashion, and Helvetia demonstrated good faith in achieving rapid compliance.

5. The violation was extremely serious. It could have resulted in fatal injuries and compromised the miners' escapeway. It was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

6. The violation was not caused by an unwarrantable failure to comply with the standard in question. This conclusion is based on my finding (Finding of Fact No. 9) that at the time of Cribb's examination, the posts appeared to be properly set. I infer, however, that they were not set adequately for the floor conditions and this caused them to become dislodged. Such would not necessarily be evident to visual examination. Helvetia's negligence is based on improper setting of the posts, and is not great.


7. Considering the criteria in section 110(i) of the Act, I conclude that the appropriate penalty for the violation is \$900.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED

1. Order No. 2015555 is VACATED as a withdrawal order and MODIFIED to a citation charging a significant and substantial violation of 30 C.F.R. § 75.200. As modified, the citation is AFFIRMED.

2. Within 30 days of the date of this decision, Helvetia shall pay the sum of \$900 as a civil penalty for the violation found herein to have occurred.


James A. Broderick
Administrative Law Judge

Distribution:

William M. Darr, Esq., Helvetia Coal Company, 655 Church Street,
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of Labor, Room 14480 Gateway Building, 3535 Market Street,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 1 1984

EDDIE LEE SHARP, : DISCRIMINATION COMPLAINT
Complainant :
 : Docket No: WEVA 82-399-D
 : MSHA Case No: CD 82-27
v. :
 : Stone Run Mine No. 6
MAGIC SEWELL COAL COMPANY, :
Respondent :

DECISION

Appearances: Eddie Lee Sharp, Elkins, West Virginia,
Complainant;
John L. Henning, Esq., Elkins, West Virginia,
for Respondent;

Before: Judge Moore

This discrimination case was heard in Elkins, West Virginia on November 29, 1983. The record was left open for the purpose of allowing Magic Sewell Coal Company to file some sort of documentation, i.e. affidavit of an officer or tax return to show that the company has no assets or income. No such documentation has been forthcoming. The only evidence as to the company's financial condition was presented by Mr. Fry, the safety director, who is neither an officer or an owner of the company.

In the early morning hours of August 5, 1982, Mr. Eddie Lee Sharp left his continuous mining machine at the face, announced he was not feeling well and crawled out of the mine. The safety director Mr. Fry had been underground and either crawled or rode the belt out at about the same time that Mr. Sharp left the mine.

On the surface Mr. Fry and Mr. Sharp had a conversation in which Mr. Sharp said something to the effect that the lack of visibility caused by the dusty conditions in the mine had made him too nervous to operate the mining machine close to other miners. Mr. Sharp did not return to work during the remainder of the shift. On the next day, August 6, when Mr. Sharp returned to the mine at the beginning of his shift, he was not allowed to work.

The first question is whether Mr. Sharp was fired laid off or whether he quit. Although the term "laid off" was used at times in the various conversations, no "lay off"

in the normal sense of the term occurred. Regardless of what the slip that Mr. Sharp received may have said, he was either fired or he quit.

None of the people involved in this matter said "I quit" or "you're fired". All of the respondent's witnesses, Superintendent Crowder, safety director Fry, who Mr. Crowder thought owned the mine, and foreman Wolfe all testified at one point, that they thought that Mr. Sharp had quit. When being cross-examined by Mr. Sharp, Mr. Fry said (Tr. 201) "when you came out of the mine, Eddie, I really thought you had quit." But back at Tr. 199 he said "When I called Crowder [Superintendent] I told him, I talked to him at length, and told him that I thought that you were not capable of operating that miner. Now, that's the only thing that I said to him". That conversation is certainly inconsistent with the notion that Mr. Sharp had quit and left. Foreman Wolfe assumed he had quit because he left without saying anything but both Mr. Sharp and Mr. Fry testified that before he left the face area Mr. Sharp said he was not feeling well and going outside.

I found Mr. Crowder's testimony rambling and laced with hyperbole to such an extent I could not tell when he was just overstating a matter or really meant it. At one point he said he worked twentyfour hours a day three or four days in a row. (Tr. 96). He stated that Mr. Sharp never mined any coal with the continuous mining machine, that he would just never reach the coal (Tr. 81). Then he changed it to saying that Mr. Sharp would only mine coal five out of ten times. He testified positively that he had pulled Mr. Sharp's time card out of the clock but on cross-examination he merely thought he had, because that was what he would usually do (Tr. 130; 131). Referring to Mr. Sharp, he testified "I didn't fire him, I just let him go." (Tr. 84). I find that Mr. Sharp was fired, but even if he wasn't the result would be the same. If Mr. Sharp was engaged in a protected activity and, for that reason, was not allowed to continue or resume his employment at Magic Sewell then he should prevail regardless of whether or not Mr. Crowder thought he had quit.

Mr. Sharp and other miners had constantly complained of the dusty conditions of the mine and the lack of water and rock dust. Three former employees of Magic Sewell testified as to the dangerous conditions at that mine. One witness and his entire crew had been fired because they refused to work without a foreman. Another miner quit after one hour. Mr. Hinchman was hired to run the continuous miner. His testimony at Tr. 55 was:

A. Well, when I got on the miner, I went to run the miner, I couldn't see to run the miner, let alone run the miner.

Q. You couldn't see to run it, what do you mean?

A. Well, the dust. There wasn't no water on the miner, there wasn't no air at the face. And, I shut the miner off and the boss was sitting behind me. I asked him about it and he said, "It's been run like this and it's going to be run like this tonight." I says, "Okay." I says, "Get on it because I'm going home."

Mr. Fry and Mr. Crowder had the attitude that it was up to the miners to see that the line curtain was properly hung and that the place was rock dusted if necessary or that water was used. Mr. Crowder seemed to be confused as to the difference between respirable dust and combustible dust and Mr. Fry was confused about when rock dust is required. He did not know the meaning of the term "to wet" as defined in 30 C.F.R. 75.402-1. I find the mine was sufficiently dusty when the continuous miner was operating to require more air and water than was provided. In fact, the federal inspectors required the use of water on the miner after this case was investigated. (Tr. 175). And any areas that were not "too wet" should have been rock dusted.

I find that Mr. Sharp was unlawfully discriminated against because of his protected activity of complaining about the dangerous conditions in the mine and refusing to work under such conditions. As to a remedy, however, I can not order that Mr. Sharp be re-instated to a job that no longer exists. As to lost wages and expenses. Mr. Sharp is ordered to present to me, within 30 days, a document showing how much he would have earned between the time he was fired and the time the mine was closed, less any wages that he earned during that period. Mr. Sharp should include any travel or other expenses incurred in the course of prosecuting this action.

Respondent may, within 15 days after receiving Mr. Sharp's document make any objections thereto it wishes and may at the same time present evidence of its financial condition. I will then render a final order unless it becomes obvious further testimony is needed.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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John L. Henning, Esq., 320 Randolph Avenue, P.O. Box 5,
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/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 1, 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 82-14-M
Petitioner	:	A.C. No. 19-00283-05007
v.	:	
	:	Assonet Sand & Gravel Co.
LAWRENCE READY MIX CONCRETE	:	
CORPORATION,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

In this case, the notice of contest card was signed by the operator and mailed to MSHA on November 13, 1981. On July 26, 1983, the Secretary of Labor was ordered to show cause why the case should not be dismissed for failure to file a proposal for a penalty. On August 22, 1983, the Secretary of Labor filed a response to the order to show cause and a petition for assessment of civil penalty.

A civil penalty petition should be filed within 45 days of receipt of a timely notice of contest of a penalty. 29 C.F.R. § 2700.27(a). The Commission has held that the late filing of a petition will be accepted where the Secretary demonstrates adequate cause and where there is no showing of prejudice to the operator. An extraordinarily high caseload and lack of clerical personnel were held "good cause" for filing two months late. Salt Lake County Road Department, 3 FMSHRC 1714 (July 28, 1981).

In Medicine Bow Coal Company, 5 FMSHRC 882 (1982), the Commission held inadequate clerical help constituted good cause for a two week delay, but pointed out that the late filings had been before its warnings in Salt Lake. In this case the Solicitor's motion for leave to file late petition sets forth:

* * * Petitioner did prepare a timely Proposal on December 16, 1981. However, for reasons which were caused by the staff attorney's failure to act and because of insertion of enclosed documents in

the wrong file, we submit that the failure to file should be construed as excusable neglect. Petitioner did not simply forget to prepare a Proposal. One was prepared, but inadvertently not filed.

The Secretary took over a year and a half to file a petition which should have been filed within 45 days. The only excuse in this case is that the Solicitor put the documents in the wrong file. This is not good cause for such an extraordinarily long delay. Indeed, the petition was filed only in response to my show cause order. The operator should not have to answer such a stale claim.

In light of the foregoing, this case is DISMISSED.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

David L. Baskin, Esq., Office of the Solicitor, U. S. Department of Labor, John F. Kennedy Federal Building, Government Center, Boston, MA 02203 (Certified Mail)

Mr. David R. Smith, President, Lawrence Ready Mix Concrete Corporation, P. O. Box 7, Ridge Hill Road, Assonet, MA 02702 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 3 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 83-85
Petitioner	:	A.C. No. 36-03425-03515
v.	:	
	:	Maple Creek No. 2 Mine
U.S. STEEL MINING COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: David A. Pennington, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This case involves two citations alleging violations of mandatory safety standards at the subject mine. Pursuant to notice the case was heard in Washington, Pennsylvania, on November 30, 1983. Citation No. 2013969, issued December 2, 1982, alleged a violation of 30 C.F.R. § 75.1403 because of the obstruction of a shelter hole. It was assessed at \$136. The parties submitted a proposed settlement of the violation for the payment of \$50. They agreed that the violation was properly designated as significant and substantial. Respondent's position is that the obstruction was only partial, and the inspector conceded that he could not recall whether it was complete or partial. I stated on the record that I would approve the proposed settlement for the violation in question.

The other citation was contested. Okey H. Wolfe testified on behalf of Petitioner; Joseph Hann testified on behalf of Respondent. Both parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. 2 Mine.
2. Respondent is a large operator, producing in excess of 15 million tons of coal annually.
3. In the 2 years preceding the date of the issuance of the citations involved herein, the subject mine had 496 paid violations of mandatory safety and health standards, 394 of which were designated as significant and substantial. This history is not such that penalties otherwise appropriate should be increased because of it.
4. The imposition of penalties in this case will not affect Respondent's ability to continue in business.
5. The violations involved in this case were both abated timely and in good faith.
6. On November 15, 1982, the air in the tailgate entry of the Longwall section was reversed and had become return air. A citation charging a violation of 30 C.F.R. § 75.316 was issued.
7. The reversal of the air in the tailgate entry was caused when the door to a regulator which determines the amount of air coursed to the face fell down. This apparently occurred on the Saturday preceding the date of the issuance of the citation which was on a Monday.
8. The approved ventilation plan at the subject mine required that the tailgate entry be ventilated with intake air.
9. The approved ventilation plan in effect at the subject mine prior to the time involved herein called for return air in the tailgate entry. It was changed to bring a greater quantity of air back through the bleeder system.
10. As a result of the reversal of the air in the tailgate entry noted in Finding of Fact No. 7, there was less air pressure on the gob area.
11. At the time the condition referred to in Finding of Fact No. 6 was cited, 20,000 to 25,000 cfm of air was measured at the tailgate end of the longwall face.

12. At the time the condition referred to in Finding of Fact No. 6 was cited, minimal methane (less than .1 percent) was detected in the longwall face area.

13. The longwall equipment has a methane monitor which is designed to deenergize the machinery in the presence of 1.5 percent methane.

14. The area where the regulator door had fallen down is normally inspected by Respondent weekly. It was scheduled to be inspected on the day the citation was issued.

15. The longwall section involved herein had been almost completely mined as of November 15, 1982. There was an extensive gob area of 2,000 feet or more behind the longwall face.

REGULATORY PROVISION

30 C.F.R. § 75.316 provides as follows:

§ 75.316 Ventilation system and methane and dust control plan.

[STATUTORY PROVISION]

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

ISSUES

1. Was the violation of 30 C.F.R. § 75.316 of such a nature as could significantly and substantially contribute to a mine safety or health hazard?

2. What is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the Maple Creek No. 2 Mine, and I have jurisdiction over the parties and the subject matter of this proceeding.

2. The condition described in Findings of Fact Nos. 6 and 7 was a violation of the approved ventilation plan and therefore of 30 C.F.R. § 75.316.

3. The violation referred to above was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

DISCUSSION

In longwall mining, when the coal is removed from the face, the unsupported roof falls creating a gob area. Because methane is released from the gob, it is imperative that substantial air pressure be maintained on the gob to dilute the methane. After the face is advanced, subsequent roof falls may occur back in the gob area and additional methane may be released into the active workings. That such an occurrence has not happened at the subject mine does not make the occurrence unlikely. The ventilation plan was devised and approved to prevent such an occurrence. To the extent it is deviated from and pressure on the gob is diminished, the occurrence of a methane ignition becomes likely. Ignition sources include the longwall shear which causes sparks while cutting, and possible permissibility violations on equipment entering the face area. If a methane ignition or explosion occurred, it would cause serious, possibly fatal injuries. Whether a violation is significant and substantial must be determined as of the time it is cited. The fact that it would likely have been spotted and corrected as a result of Respondent's weekly inspection is irrelevant.

4. The violation was serious because of the likelihood that it would cause serious injuries to miners.

5. Since there was no coal production between the time the regulator fell off and the day the citation was issued, Respondent's negligence was slight. The deviation on the fan chart was not such as should have alerted Respondent to the ventilation problem.

6. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found herein is \$300.

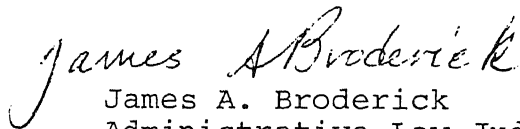
ORDER

Based on the above findings of fact and conclusions of law,
IT IS ORDERED

1. Citation Nos. 2013969 issued December 2, 1982 and 2013923 issued November 15, 1982, including their designations as significant and substantial are AFFIRMED.

2. Respondent shall within 30 days of the date of this decision pay the following penalties:

<u>CITATION NO.</u>	<u>PENALTY</u>
2013969	\$ 50
2013923	300
Total	<u>\$350</u>


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 7 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 83-64
Petitioner	:	A.C. No. 34-01010-03503
v.	:	
	:	Danger Creek Strip
RANDALL & BLAKE OF	:	
OKLAHOMA, INC.,	:	
Respondent	:	

DECISION

Before: Judge Kennedy

This matter is before me on the Secretary's unopposed motion for summary decision. Rule 64 of the Commission's rules provides a motion for summary decision shall be granted if (1) there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

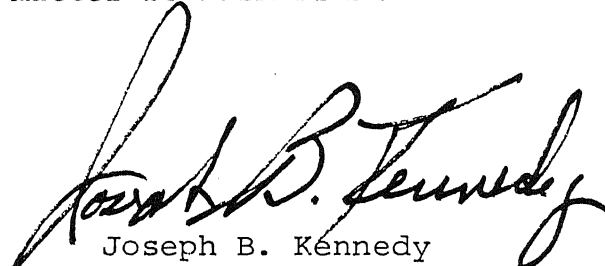
On November 9, 1983, the Secretary filed a petition for assessment of a civil penalty in the amount of \$98.00 for a single violation of 30 C.F.R. 77.1301(b) of the mandatory safety standards for surface mines. The condition cited was storage of detonators and explosives in the same magazine. The operator's answer, filed December 27, 1983, failed to deny the facts as to the violation charged but raised as a plea in bar the operator's petition in bankruptcy filed December 13, 1982.

Thereafter, the Secretary filed a motion for summary decision on the ground that (1) the fact of violation must be deemed admitted and (2) the plea in bankruptcy is no bar to adjudication of respondent's liability for the violation. The Secretary's motion was filed January 6, 1984 and is accompanied by a certificate of service of same on respondent's trustee on January 3, 1984. The operator failed to respond.

Under 11 U.S.C. § 362(b)(4) and (5) of the Bankruptcy Code the filing of a petition in bankruptcy does not stay

a civil penalty proceeding. Compare Leon's Coal Company, 4 FMSHRC 572 (1982). Further, under 11 U.S.C. § 523(a)(7) fines, penalties or forfeitures that the debtor owes the government as the result of the exercise of lawful regulatory power are not subject to discharge by the bankruptcy court. See In Re Tauscher, 7 B.R. 918 (D. Wisc. 1981).

Accordingly, it is ORDERED that the motion for summary decision be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the penalty assessed, \$98.00, on or before Friday, February 17, and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 7, 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-59
Petitioner	:	A.C. No. 15-13538-03501
v.	:	
	:	No. 3 Strip
APEX MINING, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to withdraw the petition for assessment of civil penalty for the one violation involved in the above-captioned proceeding. He moves, in the alternative, for an order approving settlement for the original assessment of \$20.

The Solicitor, noting that the operator paid the assessed penalty in full without filing an answer, submits merely "that no further proceeding in this case is necessary and that the withdrawal of the petition for assessment of civil penalty . . . is a satisfactory and appropriate resolution of this controversy." He relies upon the Commission's decision in Mettiki Coal Corporation, 3 FMSHRC 2277 (October 1981), in support of his position.

The Solicitor's motion to withdraw, alone, is not supported by Mettiki. In that case the parties submitted a settlement motion for \$7900. The Administrative Law Judge denied the settlement. Thereafter the Solicitor filed a motion to withdraw the petition for penalty assessment because the operator tendered full payment of the originally proposed penalties of \$10,000 for the seven violations at issue. The Judge interpreted the Solicitor's motion as one for approval of settlement and denied the motion. The Commission held the Judge erred in treating the Solicitor's motion as one for settlement approval. According to the Commission the Solicitor sought withdrawal of the proposed penalties and dismissal. The Commission further held that

the posture and circumstances of that case dictated a finding that the Judge abused his discretion in denying dismissal. The Commission said it arrived at its conclusion on the basis of the record which indicated that full payment of the \$10,000 penalties was a satisfactory and appropriate resolution. The Commission concluded by stating:

This is not to say, however, that the Commission or its judges may not deny a party's motion to withdraw a pleading where the record discloses that resolution of the matter pending would best be served by the Commission's settlement procedures or by an evidentiary hearing. This situation is not presented in this case.

In accordance with Mettiki, a penalty petition may be withdrawn due to full payment of the original assessment where the record reflects that full payment is a satisfactory and appropriate resolution. Therefore, in cases such as this the Solicitor must submit information to demonstrate that full payment of the originally assessed amount is a satisfactory and appropriate resolution of the matter, thereby justifying withdrawal of the penalty petition. In the instant matter, I find that the citation provides sufficient evidence that full payment is an appropriate resolution.

Citation No. 2005364 was issued for a violation of 30 C.F.R. § 50.30 because the operator failed to file a quarterly employment and injury report with MSHA. This violation is non-serious on the face of the citation because there was no safety or health hazard created by the cited condition.

In light of the above, I conclude that payment of a \$20 penalty is a settlement for this non-serious violation consistent with the purposes of the Act. I do not however, understand the Solicitor's statement that the operator was not negligent. Moreover, the Solicitor should have given information about the rest of the six statutory criteria. The non-seriousness of the violation however, justifies the penalty. And in view of the small amount, the public interest would not be served by prolonging this matter further.

ORDER

The operator having already paid, it is hereby ORDERED that this case is DISMISSED.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 7 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-101
Petitioner	:	A.C. No. 15-11408-03508
	:	
v.	:	Pride Mine
	:	
PYRO MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
William Craft, Assistant Director of Safety, Pyro
Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty for one alleged violation of mandatory safety standard 30 CFR 75.400. The violation was cited in a Section 107(a) "imminent danger" order issued by MSHA Inspector David Furgerson on May 12, 1982. The Citation No. 1133821, states the following condition or practice:

Float coal dust was permitted to accumulate on the floor of the slope belt entry and adjacent crosscuts for a distance of approximately 600 feet from bottom of slope and inby. Bottom rollers were running in float coal dust at several locations and were causing rollers to heat due to friction.

The respondent filed a timely answer to the civil penalty proposal, and a hearing was conducted in Evansville, Indiana, on November 2, 1983. The parties waived the filing of post-hearing written arguments and made them orally on the record during the course of the hearing.

Issues

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing mandatory standard as alleged in the proposal for assessment of civil penalty filed in the proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties at the hearing are discussed and disposed of in the course of my decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.
2. Section 110(a) of the Act, 30 U.S.C. § 820(a).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Docket No. KENT 83-101

Petitioner's testimony and evidence

Larry Cunningham, MSHA District 10 Mine Inspector, testified as to his background and experience, and he confirmed that he is familiar with the Pride Mine and has conducted regular and spot inspections at the facility. He also confirmed that he was at the mine on or about May 12, 1982, with fellow inspector David Ferguson for a regular inspection, and that Mr. Ferguson is no longer employed by MSHA (Tr. 8-12). Mr. Cunningham testified that on the day of the inspection he was with mine representative David Sutton in one area of the section, while Mr. Ferguson was in another. At some point during the inspection about 15 minutes later, Mr. Ferguson came to the belt haulage entry and told Mr. Sutton that he had issued an order on the belt conveyor and that the belt would have to be cleaned and rock dusted. Mr. Cunningham identified exhibit P-1 as the Section 107 "imminent danger" order issued by Mr. Ferguson, No. 1133821, and testified as to its contents (Tr. 15).

Mr. Cunningham testified that after the order was issued, he walked the cited belt entry for a distance of some 600 feet while Mr. Sutton began taking steps to correct the conditions. He explained what he observed, and indicated that "the coal dust was definitely there," and that there "was no doubt in my mind that there was a situation established" (Tr. 18). He described the area which he traveled as looking black in appearance, and while some locations were worse than others, all of the cited locations definitely had accumulations of float coal dust. He described the entry as being 18 to 20 feet wide, and confirmed that he measured the float coal accumulations with a ruler, and found that they ranged from one inch to 12 inches. He also stated that he counted eight bottom belt conveyor rollers which were in loose coal, coal dust, and float coal dust. The belt was not running, but if it were, the rollers would have been turning in float coal dust (Tr. 20).

Mr. Cunningham stated that when he first entered the section and was separated from Mr. Ferguson, the cited belt in question was running, but 20 minutes later when he walked it it was not (Tr. 20). Based on his experience, he did not believe that the cited accumulations resulted from the prior shift, and due to the extent of the accumulations, he believed they had existed for "possibly" 16 to 24 hours or longer. He was present when the conditions were corrected, and he counted 30 people in the area when clean up and abatement took place. The clean up took two hours and 45 minutes (Tr. 21).

On cross-examination Inspector Cunningham stated that he was in the mine on May 11, 1982, the day before the order issued and that he was in part of the area cited by Mr. Ferguson. However, he observed no conditions which would have prompted him to issue a citation for coal accumulations. On that day he observed two miners "correcting the situation as it occurred." He also confirmed that he was in the mine for a total of 9 or 10 working shifts during the period from April 1, 1982 to May 12, 1982 and issued no coal accumulations citations (Tr. 24).

Mr. Cunningham stated that the mine is entered by means of a slope car hoist which travels down to the belt in question and that the belt can be visually observed from the slope car. He confirmed that he did not know how many miners were in the mine on May 12, 1982, and that no one was actually physically removed from the mine as a result of the issuance of the order.

Mr. Cunningham was of the opinion that the cited coal accumulations presented a possibility of a mine fire and he described the area cited as dry. He confirmed that the belt line was moved up somewhat after the order was issued in order to facilitate the clean up, and that clean up was achieved by shovelling the accumulations onto the belt so that they could be removed from the mine (Tr. 27-28).

Mr. Cunningham confirmed that belt conveyors which are not used to transport personnel may be examined at any time during the shift, and need not be examined either before the shift or "immediately" after the shift is started (Tr. 36-38). He stated that he checked the preshift examination books for the belt conveyor in question, and found no record that it had ever been examined. As a result of this, he issued a citation for a violation of section 75.303, for failure to examine the belt, or failure to produce evidence that the belt had been examined (Tr. 43).

When asked whether he would issue an imminent danger order based on what he observed after Mr. Ferguson's order issued, Mr. Cunningham stated that he could not answer that question because at the time he observed the conditions the belt was not running and that "I never saw nothing that would promote a mine fire or explosion at that time" (Tr. 45).

Mr. Cunningham stated that the accumulations in question were in an "air lock" where the conditions would facilitate a build up of coal, and he conceded that such accumulations resulted from the mining of coal and that constant clean up is required to control the accumulations. He confirmed that no samples of the accumulations were taken, and they were not tested. He also conceded that he and Mr. Ferguson made no examinations of the power cables, cable insulation, or power boxes to determine whether or not they were in good condition or not (Tr. 50-53).

At the conclusion of the testimony by Mr. Cunningham in this case, respondent's representative suggested that MSHA had not presented any direct evidence as to the actual existence of the cited conditions as observed by Inspector Ferguson at the time he issued his citation (Tr. 54). During a discussion on the record, I advised the respondent's counsel that while it was true that Mr. Ferguson was no longer employed by MSHA and did not testify, Mr. Cunningham's first hand observations of the cited conditions after the withdrawal order was issued established a prima facie case as to the existence of the cited accumulations described by Mr. Ferguson on the face of his citation (Tr. 55-56). When asked whether he had any reason to dispute Mr. Cunningham's testimony in this case, respondent's representative replied that Mr. Cunningham "was probably one of the more reliable people employed by MSHA" (Tr. 56).

Respondent's representative suggested on the record that Mr. Ferguson's departure from his employment with MSHA was somehow connected with his relationship with the respondent, and the representative stated that Mr. Ferguson "was bitter at the Company on different matters," and suggested that there was an "ulterior motive" behind the issuance of the order in question (Tr. 58). When asked why the respondent did not contest the issuance of the order within the required statutory time period, the representative replied "I didn't have anything to do with it then" (Tr. 59). The matter was then dropped, and respondent's representative proceeded to put on a defense.

Respondent's testimony and evidence

James E. Wilson, respondent's mine foreman, testified that he has 35 years of mining experience and that he was aware of the order issued by Inspector Ferguson on May 12, 1982. He stated that according to policy the belt line is shut down every morning at 6:30 a.m. for servicing, cleaning, or the changing of rollers. He described the 600 feet of belt line cited by the inspector as an "airlock," and indicated that problems occur with float dust in that area. He described the ambient temperature of the mine as 62 degrees, and stated that the air velocity in the area was 40,000 cubic feet (Tr. 61). Mr. Wilson indicated that he found no hot rollers when he went to the area and that the belt line may be examined at any time during the shift. He also indicated that Inspector Cunningham had been in the area the night before the order was issued and that he issued no citations or orders (Tr. 62).

On cross-examination, Mr. Wilson stated that he believed the belt was shut down because the mine was operating on 10-hour shifts, and that it is down for four hours from the time the previous shift ended. After maintenance, the belt would start up again at approximately 7:30 a.m. (Tr. 65). He confirmed that on the day the order issued, he went underground at 9:00 a.m., but that between the time of his arrival at the mine that day and the time he went underground he personally did not know whether the belt was running or not (Tr. 67).

In response to further questions, Mr. Wilson confirmed that after the order was issued he observed the conditions at the cited area, and while he saw some float coal dust at nch deep where men were shovelling, he did not see coal. He then stated that he walked the entire area where he did observe coal accumulations, but e "a dangerous amount of accumulations" (Tr. 68).

He stated that to the best of his recollection the belt began running at 10:00 a.m. and that no coal was loading from the beginning of that shift until 10:00 a.m. (Tr. 71).

Gregory R. Farrell, testified that on May 12, 1982, he was the third shift mine foreman, and that the belt was not running because some rollers had to be "cut out from under a bridge" (Tr. 72). The belt is normally running, but on that day it was not. He confirmed that he was in the middle of the 600 foot area cited by Mr. Ferguson when he was there, and that the belt was not running. Mr. Farrell also stated that he recalled 15 people working in the area to abate the cited conditions (Tr. 74).

On cross-examination, Mr. Farrell stated the cited belt was down from 6:30 a.m. to 11:00 a.m., because Mr. Ferguson's order was issued at 9:00 a.m., and the belt never started up (Tr. 76). He reiterated that the belt was down from 6:30 a.m. until the cited conditions were abated at approximately 11:45 a.m. (Tr. 76). He stated that maintenance work on the belt began at 6:30 a.m., and that the work consisted of changing rollers. The work was not completed at the time the order issued (Tr. 79).

In response to further questions, Mr. Farrell stated that the reason it took so long to clean up is that Mr. Ferguson wanted materials such as wooden timbers, metal rollers, and "anything lying around" cleaned up and taken out of the area (Tr. 85). Mr. Farrell conceded that there were accumulations of coal present, but he disputed the depths noted by the inspector, and he described them as "normal" for the mine area in question (Tr. 84). Mr. Farrell confirmed that he made no measurements of the accumulations (Tr. 85).

Randy Byrum testified that on May 12, 1982, he was employed at the mine as a belt mechanic. He began work at 8:00 a.m. that day and at that time the belt in question was not running. He performed maintenance on the belt, and that work included the "cutting out" of a belt roller at a conveyor "bridge" area by means of a torch, and at this time the belt power was disconnected by an outside mechanic to insure that his work could be done in a safe manner. He stated that it took him approximately 45 minutes to an hour to complete his work and that two other mechanics were also performing some maintenance on the belt. He was sure that the belt was not running at 9:00 a.m. that day (Tr. 87-89).

On cross-examination, Mr. Byrum stated that he was sure that his belt maintenance work was completed by 9:30 a.m., and he indicated that he did not see Inspector Ferguson that day because Mr. Ferguson would have traveled the belt through another route (Tr. 89-91).

Lillian J. McNary testified that on May 12, 1982, she was working in the cited conveyor belt area shovelling and rock dusting the belt header. She began work at 7:00 a.m. that morning. She checked the belt header area and the air lock and she used a water hose located at the belt to wet the belt line area down. She was present when Inspector Ferguson was there and had started watering the area down while he was there (Tr. 95-97).

On cross-examination, Ms. McNary confirmed that her usual duties are to clean the cited belt, as well as another belt and that she starts at the air lock location. She stated that she had been cleaning the cited belt area for approximately two hours before Inspector Ferguson arrived at the scene. She confirmed that the float coal dust cited by Mr. Ferguson was present, and she described the belt as "dirty" (Tr. 97-100).

David Sutton, testified that he is the mine safety director and that on May 12, 1982 he started work at 6:00 a.m. He rode into the mine with Inspectors Ferguson and Cunningham sometime between 8:30 and 9:00 a.m. He was with Mr. Cunningham while he was conducting his inspection, and was informed by Mr. Ferguson that he had issued a closure order on the belt. Mr. Sutton confirmed that approximately 15 or 20 minutes after he was told that a closure order had been issued he went to the area and personally observed the float coal dust. He stated that the belt was not running, and that he heard several miners asking why the belt was down (Tr. 101-104).

Findings and Conclusions

Fact of Violation

Respondent here is charged with a violation of mandatory safety standard section 30 CFR 75.400, which states as follows:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Although the inspector who issued the citation in question was no longer employed by MSHA at the time of the hearing and did not testify, Inspector Cunningham, who was present and viewed the cited conditions shortly after the violation was

issued, did testify as to what he observed. In addition, respondent's mine foreman, shift foreman, and clean-up person all confirmed the presence of loose coal and float coal dust in the cited area. Although one witness may have taken issue with whether or not the accumulations were "dangerous," the fact is that the respondent has not rebutted the fact that the cited conditions did in fact exist as stated in the citation. The detailed testimony provided by Inspector Cunningham, including his measurements and observations, are unrebutted and amply support the violation.

I conclude and find that the petitioner has established the fact of violation by a preponderance of the credible evidence adduced in this case. I also find and conclude that the extent of the accumulations supports a finding that the cited coal accumulations in question were not the result of any "instantaneous spillage," nor can I conclude that the respondent has established that it was in the process of correcting the conditions when the inspector arrived on the scene. To the contrary, I conclude and find that the extensive nature of the cited conditions supports a conclusion that they were permitted to accumulate, and existed at least one prior shift. Accordingly, the violation IS AFFIRMED.

Gravity

Although it is clear to me that the question as to whether or not the cited accumulations constituted an "imminent danger" is not an issue in this civil penalty case, and that the validity of the Section 107(a) Order is not per se an issue, petitioner's counsel candidly conceded during oral argument that it was altogether possible that Inspector Ferguson issued the order to insure that the condition which he observed were attended to promptly, and that he acted to insure that the cited belt conveyor in question would not be placed into operation until such time as the cited coal accumulations were cleaned up and removed from the mine (Tr. 92-93).

In view of the fact that Inspector Ferguson did not testify in this case, petitioner's counsel further candidly conceded that the question as to whether or not the conveyor belt in question was running or not running at the time the order was issued is only critical insofar as the degree of gravity is concerned (Tr. 93). In this regard, counsel conceded that Inspector Cunningham did not observe the belt running at the time the violation was issued, and he stated that "at no time through testimony did we assert that the belt was running" (Tr. 94). He also conceded that any suggestion that the belt in question was in fact "running in float coal dust" has not been established as a fact through any credible testimony (Tr. 94).

On the basis of all of the credible evidence and testimony adduced in this case, I conclude that the petitioner has not established as a matter of fact that the conveyor belt in question was running in float coal dust at the precise time the inspector viewed the conditions. However, given the extensive accumulations of coal dust and float coal dust which was present in the cited areas, I conclude and find that the violation was serious.

With regard to the inspector's finding that the cited violation was "significant and substantial," I take note of the following interpretation placed on that term by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), aff'd in Secretary of Labor v. Consolidation Coal Company, decided January 13, 1984, WEVA 80-116-R, etc., affirming a prior holding by a Commission Judge, 4 FMSHRC 747, April 1982:

[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

In its most recent holding in Consolidation Coal Company, WEVA 80-116-R, etc., January 13, 1984, the Commission stated as follows at pg. 4, slip opinion:

As we stated recently, in order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., FMSHRC Docket No. PENN 82-3-R, etc., slip op. at 3-4 (January 6, 1984).

On the facts of the case at hand, it seems clear to me that the respondent has not rebutted the fact that the accumulations of coal and coal dust, including float coal dust, were present

in the areas cited by the inspector. The respondent's defense focused on the assertion that the belt was not running, and a rather feeble attempt to establish that clean-up procedures were being followed at the time of the inspection. In addition, at least one or more of respondent's witnesses were of the opinion that the accumulations found by the inspector were "not dangerous." These defenses are rejected.

It seems clear to me that the cited accumulations were present, and that the areas cited were not adequately rock-dusted. Due to the extensive nature of the accululations, both as to quantity, as well as the rather extensive 600-foot areas where they were present, I conclude and find that they did in fact present a reasonable likelihood that had production continued, the belt would have started up, and an ignition could have occurred from the belt rollers which obviously would have been turning in the accumulations. I believe it was reasonable **that a fire or ignition would have resulted.** Consequently, I find that the cited coal accumulations presented a real hazard which would have significantly contribute to a major cause of danger and hazard to the miners working on the section. Accordingly, the inspector's finding of a significant and substantial violation IS AFFIRMED, and respondent's arguments to the contrary ARE REJECTED.

Negligence

In this case, while there is testimony from the clean-up person McNary that she was in the process of watering down some of the area cited by Inspector Ferguson when he first arrived on the section, and that she had cleaned up some of the accumulations before he arrived, Inspector Cunningham testified that he examined the preshift examination books and found no entries or evidence that the cited area had been examined as required by section 75.303. Taking into account the extensive accumulations which were cited, I believe it is reasonable to conclude that had closer attention been given to promptly clean up the accumulations, the violation would not have occurred. While it may be true that the belt in question may have been down for some maintenance at the start of the shift, I still believe that respondent failed to take reasonable care to insure that all of the accumulations found by the inspector were cleaned up and the area rock-dusted. Under the circumstances, I find that the violation resulted from ordinary negligence on the part of the respondent.

History of Prior Violations

The record here shows that for the period June 22, 1981 to May 11, 1982, respondent had eight prior citations for violations of section 75.400. Petitioner's counsel agreed that given the fact that there is no evidence as to the specific circumstances connected with these prior citations, respondent's history of prior violations for purposes of any civil penalty assessment does not appear to be "particularly bad" (Tr. 116). Accordingly, for an operation of its size, I cannot conclude that any civil penalty assessed by me in this case should be increased because of respondent's history of noncompliance.

Size of Business and Effect of Civil Penalty of the Respondent's Ability to Remain in Business.

The record in this case establishes that at the time the citation issued, the annual coal production at the mine in question was approximately 400,000 tons (Tr. 116). While it may be argued that Pyro Mining Company is a large mine operator, the Pride Mine was a relatively small or medium-sized mining operation. In any event, I cannot conclude that a reasonable civil penalty assessment in this case will adversely affect the respondent's ability to continue in business. Further, in assessing a civil penalty in this case, I have considered the respondent's history of prior violations as well as the size of its mining operations.

Good Faith Compliance

The respondent promptly cleaned up and removed the cited accumulations from the mine after the order issued. Accordingly, I find that abatement was achieved by respondent's ordinary good faith compliance efforts.


Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of Section 110(i) of the Act, I conclude and find that the following civil penalty assessment is appropriate for the citation which has been affirmed:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
1133821	5/21/82	75.400	\$975

ORDER

Respondent IS ORDERED to pay the civil penalty assessed by me in this case within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Darryl A. Stewart, Esq., U.S. Department of Labor, Office of the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

William Craft, Assistant Director of Safety, Pyro Mining Company, P.O. Box 267, Sturgis, KY 42459 (Certified Mail)

/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 7 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-186
Petitioner	:	A.C. No. 15-10339-03514
	:	
v.	:	No. 11 Mine
	:	
PYRO MINING COMPANY,	:	Docket No. KENT 83-187
Respondent	:	A.C. No. 15-10815-03510
	:	
	:	Wheatcroft Mine

DECISIONS

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
William Craft, Assistant Director of Safety,
Pyro Mining Company, Sturgis, Kentucky, for
Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for five alleged violations of mandatory health standard 30 CFR 70.220.

Respondent filed timely contests taking issue with the citations and pursuant to notice hearings were convened in Evansville, Indiana, on November 2, 1983, and the parties appeared and participated fully therein. The parties waived the filing of post-hearing written arguments and made them orally on the record during the course of the hearing.

Issues

The issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing mandatory standards as alleged in the proposals

for assessment of civil penalties filed in the proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties at the hearing are discussed and disposed of in the course of my decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.
2. Section 110(a) of the Act, 30 U.S.C. § 820(a).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

KENT 83-186

This proceeding concerns two section 104(a) citations served on the respondent on November 16, 1982, for violations of mandatory health standard 30 CFR 70.220.

Citation No. 2075605 describes the cited condition or practice as follows:

The operator submitted the attached status change form, dated 10-18-82, showing mmu 011-1 nonproducing effective 10-18-82. Production records show mmu 011-0 operated approximately 67 production shifts in 40 days during the Sep.-Oct. 1982 cycle with an average production of over 650 tons per shift. Included during this period were at least 9 production shifts on Oct. 26, 27, 28, 29, and 30, 1982. Also records show mmu 011-1 has operated at least 15 production shifts in 9 days during Nov. 1982 with an average production of over 600 tons per shift. The attached computer print-out dated 11-8-82 shows no respirable dust samples were submitted for the Sep.-Oct. 1982 cycle. Responsibility of Tom Hughes Dust Tech.

Citation No. 2075606 describes the cited condition or practice as follows:

The operator submitted the attached status change form, dated 10-18-82, showing mmu 012-0 non-producing effective 10-18-82. Production records show mmu 012-0 operated approximately 23 production shifts in 23 days during the Sep.-Oct. 1982 cycle with an average production of over 600 tons per shift. Included during this period were at least 9 production shifts on Oct. 20, 22, 23, 26, 28, 29, and 31, 1982. Also records show mmu 012-0 has operated at least 5 production shifts in 3 days during Nov. 1982 with an average production of over 630 tons per shift. Responsibility of Tom Hughes.

KENT 83-187

This proceeding concerns three section 104(a) citations served on the respondent on November 16, 1982, for violations of mandatory health standard 30 CFR 70.220.

Citation No. 2075602, describes the cited condition or practice as follows:

The operator submitted the attached status change form dated 10-19-82, showing mmu 003-0 in abandoned status effective 9-1-82. Production records show mmu 003-0 operated approximately 18 production shifts in 11 days during the Sep.-Oct. 1982 cycle, with an average production of over 700 tons per shift. The attached computer printout dated 11-8-82, shows no respirable dust samples were submitted for this cycle. Records show citations for exceeding the dust standard were issued for mmu 003-0 no less than three times within the past year. Responsibility of Dennis Travis Dust Tech.

Citation No. 2075603 describes the cited condition or practice as follows:

The operator submitted the attached status change form, dated 10-25-82, showing mmu 005-0 in producing status effective 9-1-82. The status also states the unit is spare, nonproducing, has not run five production shifts during the mining cycle. Production records show mmu 005-0 operated approximately 73 production shifts in 73 days during the Sep.-Oct. 1982 cycle with an average production of over 600 tons per shift.

The attached computer printout, dated 11-8-82 shows no respirable dust samples were submitted for this cycle. Records show citations for exceeding the dust standard were issued for mmu 005-0 no less than two times within the past year. Responsibility of Dennis Travis Dust Tech.

Citation No. 2075604 describes the cited condition or practice as follows:

The operator submitted the attached status change form, dated 10-19-82, showing mmu 006-0 abandoned effective 9-1-82. Production records show mmu 006-0 operated approximately 21 production shifts in 13 days during the Sep.-Oct. 1982 cycle with an average production of over 750 tons per shift. the attached computer printout, dated 11-8-82, shows no respirable dust samples were submitted for this cycle. Records show at least one citation for exceeding the dust standard was issued for mmu 006-0 within the past year. Responsibility of Dennis Travis, Dust Tech.

Testimony and evidence. KENT 83-187.

MSHA Inspector Arthur L. Ridley, testified as to his background and experience, and he stated that section 70.220 of the mandatory standard requires that certain changes on the status of certain coal producing and sampling units be reported to MSHA within three days of the time the change occurs. He stated that changes of producing units to nonproducing or temporary nonproducing, or abandoned areas must be reported. He identified exhibit P-1 as a status change form executed by respondent's mine technician Dennis Travis showing that the mechanized mining unit at the Wheatcroft Mine, No. 003 was placed in an abandoned status effective September 1, 1982, and that it was filled out and signed by Mr. Travis on October 19, 1983 (Tr. 17-20).

Mr. Ridley explained that a "mechanized mining unit" in this case consists of a certain amount of equipment used for coal production, such as a cutting machine, a loading machine, and shuttle cars, all of which are used in one set of rooms for coal production purposes. The exhibit in question is a form supplied by MSHA, and section 70.220 requires that it be filled out by an operator and filed with MSHA. The form in question came to his office as a routine matter and he has previously examined the original copy on file in his office. He saw no form previous to the one filed in this case. He also confirmed that exhibit P-1, page one, is a copy of Citation No. 2075602 issued by MSHA Inspector

Thomas M. Lyle, and he explained that such a citation would be issued after a review of the status change form to ascertain whether it was timely filed (Tr. 24).

Mr. Ridley stated that the original citation issued by Mr. Lyle contained no negligence findings on the face of the form, but that he (Ridley) modified the citation on January 7, 1983, to include a negligence finding. He stated that he made this finding after reviewing the status form and finding that a month and a half had gone by since the unit in question was reported abandoned, and he believed that the respondent was negligent in not submitting the form sooner (Tr. 25).

On cross-examination, Mr. Ridley confirmed that MSHA's regulations do not require a mine operator to file a daily coal production report for each coal producing unit (Tr. 29). He also confirmed that while it is not a common practice for MSHA's health staff to delve into company production records, it has been done in the past, but infrequently (Tr. 30). He also confirmed that an inspector is instructed to make any negligence and gravity findings by filling out the appropriate places on the citation form at the time he issues the citation (Tr. 31). He conceded that his modification of the citation by filling out the negligence portion of the citation form issued by Inspector Lyle 52 days after the initial service of the citation on the respondent in this case "was a long period of time" (Tr. 32). Mr. Ridley also confirmed that his supervisor Charles E. Dukes instructed him to modify the citation to show a "high degree of negligence" (Tr. 35). Mr. Ridley stated further that had he issued the original citation, he would have made the same negligence finding (Tr. 36).

Mr. Ridley explained that under MSHA's dust sampling procedures, an operator must take five valid dust samples within each two month period (Tr. 37). He agreed that if the respondent sampled during the September-October sample cycle and then abandoned the unit on September 25, he could legally do this since the sample cycle had not run its course (Tr. 40).

Respondent's testimony and evidence

Dennis Travis, testified that he was familiar with the three citations issued by MSHA Inspector Lyle on November 16, 1982, concerning the filing of the mine status change forms in question. Mr. Travis confirmed that he was employed as an environmental health technician at respondent's Wheatcroft Mine. With regard to Citation No. 2075602, Mr. Travis stated that mine records indicated that coal was produced on the

unit in question during the first 10 days of September, but not after that date. When asked to explain the circumstances surrounding the filing of the form in question, he responded as follows (Tr. 56-57):

Well, coming back to the 18th of October I realized that this production unit, 003-0 was not going to be running any longer and I knew that it had run a few days in the month of September which is the first month of the bi-monthly sampling cycle. At that time I knew that there would have to be some samples taken to comply with the respirable dust law which requires us to submit five accurate samples during a bi-monthly period. I also knew that it was impossible to do that because the equipment had been moved out of that area. At that point, to keep from either receiving a violation stating that I did not send in accurate respirable dust samples and to try to find out exactly what needed to be done at this point because of the abandonment of the area, I called the MSHA Office in Madisonville to talk to the health specialist, the desk specialist supervisor which was Mr. Dukes. I felt that Mr. Dukes would be the one to answer my questions since he was the supervisor and -- So I spoke to him about the matter, told him what the situation was, and I had a few days in the first part of the sampling cycle that had produced coal on that unit but yet the unit wouldn't be producing any longer; and asked him, at that point, what needed to be done.

I knew that a status change form should be submitted, I felt like it should. And I asked him at that point if that's what I should do. And he informed me, and advised me to send in a status change form abandoning the section and dating it at the beginning of the bi-monthly sampling cycle to avoid any confusion. And abandoning it at that point.

In response to further questions, Mr. Travis confirmed that he submitted the form in question for Unit 003-0 on October 19, 1982, but that the effective date of the status change was September 1. No form was submitted during the period September 1 through October 19, 1982, and when asked why he did not comply with the three-day reporting requirement of section 70.220, he responded as follows (Tr. 61-62).

A. I wasn't wanting to avoid taking samples. If the unit had been in production the last two weeks of this month the samples would have been taken, I was advised by the MSHA Supervisor, Mr. Dukes, to date it at that particular time. If I had dated it three days prior to the 19th of October which would've been 10/16 --

Q. Uh-hm.

A. -- then I could have been and probably would have been cited for failure to submit samples during that bi-monthly sampling cycle even though the unit was down and abandoned, and the status change submitted at the proper time.

Q. Okay. If I understand your testimony the unit was not down during the period.

A. During the first eleven days, that's correct.

Q. So if it was producing during the first eleven days, withdrawing of course, do you understand the bi-monthly cycle of respirable dust requirements to dictate that if you produce coal at all during the two month period you have to submit the samples.

A. No, sir. I do not.

Q. What do you understand that to require?

A. It has to be filed four shifts, four production shifts, to be required to submit samples during that time.

Q. At any time during that period of time.

A. That's correct.

Q. Did you produce any five shifts?

A. Yes, sir.

Q. During that time?

A. Yes, sir.

Q. And did you submit any respirable dust samples?

A. No, sir.

Mr. Travis confirmed that mining unit 003-3 was permanently abandoned on October 17 or 18, 1982, and that from September 11, 1982, until it was abandoned it was in a "technically temporarily abandoned" status. Although the unit was not producing coal during this time, the equipment was still there, the area was being ventilated, and Mr. Travis characterized the unit as a "spare" to be used "as needed" (Tr. 63).

Respondent's counsel asserted that all of the remaining citations at issue in these proceedings concern the same factual setting (Tr. 86). MSHA's counsel confirmed that Citation No. 2075603, exhibit P-3, concerns a mine status change form submitted by Mr. Travis on October 25, 1982, and the form shows that the 005-0 mining unit in question was "nonproducing" effective September 1, 1982. MSHA counsel took the position that the form should have been filed by September 4, 1982, and he also asserted that Mr. Ridley modified this citation, and that if called to testify he would confirm that he received the same instructions to mark if "high negligence," and that the reason he did so was because of the time lapse from September 1 to October 25, 1982 (Tr. 87-89).

Respondent's counsel confirmed that the 005-0 unit was in fact nonproducing on September 1, 1982, and that it was in the same status as the previously cited unit. He explained that the mine was being abandoned in order to start a new mine, and the mining units in question were being moved around while renovations and overcasts were being constructed (Tr. 89). He conceded that the notation on the citations that a search of company records reflected that there were 73 production shifts during a forty-day period during September and October 1982 "were probably right" (Tr. 90). He also confirmed that the 005-0 mining unit consisted of five pieces of equipment (shuttle car, cutting machine, loading machine, reel, and roof bolter), and that this unit was assigned to the cited mine location to produce coal (Tr. 91).

MSHA's counsel identified exhibit P-4 as a copy of Citation No. 2075604, issued by Inspector Lyle on November 16, 1982. The citation states that the required MSHA change form was dated October 19, 1982, indicating that mining unit 006-0 was abandoned effective September 1, 1982. The form submitted by Mr. Travis identifies the "unit" as "designated occupation code 036," which is for the "high risk" continuous miner operator (Tr. 115-116). Respondent's counsel confirmed that the section where the miner had been operated was abandoned, and the miner machine was moved someplace else (Tr. 117). Respondent's counsel also indicated that if called to testify, Mr. Travis would explain the circumstances as follows (Tr. 117-119):

JUDGE KOUTRAS: So you abandoned the 006-0 section where this miner was operating?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: And that's a change in the status of the mine, isn't it?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: It is also a change in the status of that particular mining machine, is it not?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: It was moved someplace else?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: And on both of those changes in status with both the mine where the coal was being mined to when it was abandoned and the continuous miner being moved someplace else, that miner wasn't abandoned, it was simply rerouted someplace else. That's also a change in status isn't it?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: Both of those circumstances have to be reported on the 70.220, do they not?

MR. CRAFT: According to law.

JUDGE KOUTRAS: Okay. Now, let's say you've got this one. Is it the same type of a thing?

MR. CRAFT: Exactly. If you call Mr. Travis back to the stand he will tell you exactly what he told you before.

JUDGE KOUTRAS: Is that Mr. Travis didn't know that 006-0 section was abandoned, they were not mining coal, he didn't know that the continuous mining machine was being moved someplace else.

MR. CRAFT: Mr. Travis --

JUDGE KOUTRAS: When he finally learned that he picked up the phone and called MSHA. Is that what he's testifying to?

MR. CRAFT: Mr. Travis will tell you that the status while we were starting these two mines and abandoning these two mines we swapped equipment around like a yo-yo.

JUDGE KOUTRAS: He did that.

MR. CRAFT: He would do exactly like you said. When he learned of it he would call MSHA, that's exactly what he did.

JUDGE KOUTRAS: On this particular citation, is this the case?

MR. CRAFT: Yes, sir.

JUDGE KOUTRAS: He didn't know that this continuous mining machine was being moved out.

MR. CRAFT: He didn't know when. They only ran, I'm sure you have, they ran the first 13 days of September, they didn't run anymore. He didn't know that they wouldn't be running until management told him we're moving it out, abandon the section. We're moving it and it won't be back.

JUDGE KOUTRAS: And you didn't know then you were going to move the 006-0.

MR. CRAFT: He wouldn't have any way of knowing. The health specialist doesn't manage the coal mines. He works, he superintends the mines.

JUDGE KOUTRAS: Well, maybe you ought to give the responsibility of filling out these forms to somebody else other than Mr. Travis.

Testimony and evidence. KENT 83-186.

MSHA's counsel identified exhibits P-5 and P-6 as copies of Citations 2075605 and 2075606, and copies of the MSHA mine status change forms in support of the citations. The parties agreed that Inspector Ridley modified these citations to indicate a "high degree of negligence," and that if called to testify he would confirm that Inspector Lyle made no such negligence findings, and that Mr. Ridley modified the citations on instructions by his supervisor Mr. Dukes (Tr. 140-142).

Exhibit P-7 is a computer print-out of the history of prior citations for respondent's No. 11 Mine, and by agreement of the parties it was made a part of the record (Tr. 142). MSHA's counsel agreed that his case in this docket was being submitted as a "documentary case," and the parties made the following arguments in support of their case (Tr. 143-147):

MR. STEWART: Your Honor, the theory is that the Pyro Mining Company, No. 11 mine, failed to submit a status change subsequent to the ones that are associated with citation 205 which indicates that the mine was abandoned on, I believe, on October 18th; and with respect to citation 606 showing that the mine was abandoned, that the mining unit was abandoned on October 18th. In fact it recites that coal was produced subsequent to those days on numerous shifts, and we should've been notified that it was not in a producing status.

JUDGE KOUTRAS: Okay. Mr. Craft, what say you about these two citations?

MR. CRAFT: Basically, your Honor, when they were abandoned, they were abandoned. They weren't producing 18, 19, 20, 21, 22; and the fact that the negligence wasn't checked till 52 days later. And that they were terminated five minutes, the one in question was terminated, written at 9:10 and terminated at 9:20.

JUDGE KOUTRAS: And the other one was written at 9:30 and terminated at 9:45.

MR. CRAFT: That's right, your Honor.

JUDGE KOUTRAS: And again I take it that Mr. Stewart can you explain why the time frames are so short here? Is it that once the citation was served the operator submitted the report. It says on here, correct status change form was placed in the back and production status was filed. Is that -- Now wait a minute -- Will be submitted in the shifts.

MR. STEWART: Will be submitted. Yes.

JUDGE KOUTRAS: Have the reports been submitted, do you know?

MR. STEWART: To my mind they have been.

JUDGE KOUTRAS: Okay. And do you dispute the fact that these units were in production as noted on the condition of practice here, Mr. Stewart, Mr. Craft.

MR. CRAFT: Your Honor, I'd like to clarify one point. On these terminations, he wrote the citation on 11/16/82 on 605. Right?

JUDGE KOUTRAS: On what? Yes, okay.

MR. CRAFT: On his termination he says, "the correct status change form placing MMU 011 back in the producing status 11/15." If we would've submitted that form on 11/15, the citation shouldn't have been written on 11/16. He wrote the citation on 11/16 and he terminated it on the same. We submitted in on 11/15. That would've been a case where he could've cited us for as being late.

MR. STEWART: Your Honor, there is no provision for being late. The status says that he didn't submit it within three days of the change of status. The face of the citations indicates that coal was being produced --

MR. CRAFT: But, your Honor --

MR. STEWART: -- two weeks prior to November 15th.

MR. CRAFT: The problem is, your Honor, that is he submitted the status change on 11/15, why were we cited on 11/16?

MR. STEWART: Your Honor, it's the same argument that he proves in the subsequent proceeding. That the status change was submitted on October 19th and he went and wasn't cited till November something. I don't think that that goes to whether there was a violation or not.

MR. CRAFT: When Mr. Ridley modified it for high negligence he should've modified the termination point.

JUDGE KOUTRAS: Okay. But do you dispute the fact that these units were in fact in production on the dates stated on the face of these citations?

MR. CRAFT: I don't dispute the facts that they were in production. I contend that they were stand-by units and we were acting under instructions from MSHA.

JUDGE KOUTRAS: On instructions from MSHA to do what?

MR. CRAFT: To submit the form, you know, because of the stand-by units and then put it in that status until we got it plumb out and then abandon it permanently which we did later.

JUDGE KOUTRAS: Okay. Anything further? Do you wish to present any evidence on these?

MR. CRAFT: No, sir.

JUDGE KOUTRAS: On these citations. Do you have anything else Mr. Stewart?

MR. STEWART: No, your Honor.

Findings and Conclusions

Fact of Violations

Section 70.220 states in pertinent part as follows:

(a) If there is a change in the operational status that affects the respirable dust sampling requirements of this part, the operator shall report the change in operational status of the mine, mechanized mining unit, or designated area to the MSHA District Office or to any other MSHA District Office designated by the District Manager. Status changes shall be reported in writing within 3 working days after the status change has occurred. (Emphasis added).

Section 70.220(b) defines each specific "operational status" which is required to be reported for (1) the mine, (2) the mechanized mining unit, or (3) the designated area. These general categories are further reduced to define whether they are "producing," "nonproducing," or "abandoned."

Each of the five citations in these proceedings charge the respondent with failure to timely report the status of certain designated mechanized mining units ("mmu's"). The citations were issued by MSHA Inspector Thomas M. Lyle, and at the time of the hearings in these cases he was unavailable for testimony because he was on disability sick leave. The information on which Mr. Lyle based his citations was furnished by MSHA Inspector Robert Smith. Mr. Smith was not present at the hearings because he was attending an MSHA training class at Beckley, West Virginia.

In each instance noted above, Inspector Lyle issued his citations because the status change forms which were in fact filed by the respondent's representative on October 18, 19, and 25, 1982, reported that the mechanized mining units in question were either "nonproducing" or "abandoned" when in fact MSHA had reason to believe they were operational and producing coal. MSHA's support for its assertion that the units were producing coal came from a search and review of certain company production records apparently volunteered to Inspector Smith, as well as certain MSHA records indicating that dust samples were not filed for the units in question, or that the respondent was out of compliance during certain sampling cycles. In short, MSHA's position seems to be that (1) the mechanized units reported as nonproducing or abandoned were in fact producing, and (2) the respondent here has filed erroneous reports.

Respondent's defense to the violations is based on its assertions that the cited mining units in question were not technically in production, but were somehow "temporarily abandoned" or on "standby" to be used periodically when the need arose. Respondent advanced the argument that the term "nonproducing" means the same as "abandoned," and that it did not report the status changes in question because it did not know for sure whether any particular unit would be permanently abandoned or simply idled while other mine work was being done (Tr. 63, 65).

Respondent's dust technician Dennis Travis, the individual who filed the reports in question, as well as respondent's trial representative William Craft, conceded that the failure to file the required changes within the three-day regulatory period when the sections in question were in fact in production constituted violations of section 70.220 (Tr. 60-66; 92-95; 106-107; 117-119).

From the record in this case, I am convinced that the respondent contested the citations because it believed that MSHA's enforcement office acted arbitrarily when it subjected the citations to the "special assessments" procedures. Respondent's testimony in its defense suggests that Mr. Travis may have been misled into believing that the status reports could be filed when he filed them, and that contrary to MSHA's position, Mr. Travis acted reasonably and in good faith. However, these are mitigating circumstances, and when taken in conjunction with other mitigating circumstances as discussed below, may be considered by me in the assessment of civil penalties for the violations. However, it seems clear that these mitigating circumstances may not serve as an absolute defense to the citations, nor may they serve as a basis for outright dismissal of the citations.

After careful review and consideration of all of the credible testimony and evidence adduced in these proceedings, I conclude and find that the petitioner has established by a preponderance of the evidence that the respondent violated the provisions of mandatory standard 30 CFR 70.220, by failing to accurately report the fact that the status of the cited mechanized mining units had changed. Failure to report such changes within the three-day period provided by the regulatory standard constitutes a violation. Accordingly, the five citations in question are all AFFIRMED.

History of Prior Violations

The history of prior paid assessments for the respondent's No. 11 Mine is reflected in the computer print-out, exhibit P-7 (KENT 83-186). The mine history for respondent's Wheatcroft Mine is shown in exhibit P-2 (KENT 83-187). For the periods April 7 and June 18, 1981, through November 15, 1982, neither mine had ever been cited for failure to comply with the reporting requirements found in section 70.220, and Inspector Ridley confirmed that this is in fact the case (Tr. 128-129).

The computer print-outs reflect that the No. 11 Mine had 12 prior citations for violations of sections 70.207(a) or 208(a), the standards dealing with bimonthly sampling of mechanized mining units and certain designated areas. With the exception of one \$60 assessment, the rest were "single penalty" \$20 assessments. The Wheatcroft Mine was cited for three violations of section 70.207(a), and one violation of section 70.208(a), and all of these were "single penalty" \$20 assessments.

In addition to the above-mentioned citations, the computer print-out reflects ten total prior citations at both mines for violations of the respirable dust standards found in section 70.100. However, since no evidence was adduced as to the facts and circumstances surrounding any of these prior dust citations, I have no way of evaluating whether the mines in question have a dust problem, or whether or not the respondent has failed to attend to these conditions. However, I do note the fact that the 15 dust citations noted above were among a total of 273 citations issued during the period shown on the print-outs. Taken at face value, and considering the size of both mining operations, I cannot conclude that respondent's prior compliance record is such as to warrant any additional increases in the civil penalties which I have assessed for the citations in questions. Further, the petitioner has advanced no credible arguments or presented any evidence to establish anything to the contrary.

Gravity

Although Inspector Lyle did not consider any of the violations to be "significant or substantial," and the special assessment officer found that the gravity of each violation was "nonserious," the "narrative findings" supporting the initial assessments not only took into account the submission of "erroneous status change reports," but specifically took into account "the failure of the operator to take the dust samples required during periods of active mining." Because of this asserted "failure," MSHA's assessment officer concluded that during the period of active mining "excessively dusty conditions were allowed to go undetected" and that this in turn "could have allowed the miners to be continuously exposed to excessive concentrations of respirable dust."

While it is true some of the citations make reference to the fact that the respondent did not submit dust samples for several sampling cycles during the production shifts in question, and that several mining units had been cited for being out of compliance during the year preceding the citations in questions, petitioner presented no credible testimony to establish or support any conclusion that "excessively dusty conditions were allowed to go undetected." Further, the inspector who issued the citations made some rather low gravity findings on the face of all of the citations, and since he did not testify, I reject the petitioner's reliance on speculative second-guessing by its assessment office as stated in the "narrative findings."

It seems clear to me that the reporting requirements of section 70.220, are intended to provide MSHA with "tracking information" so as to insure compliance with the applicable dust standards found in Part 70 of its regulations. Since the use and location of mining equipment at any given time in the mining environment are critical in determining the potential respirable dust levels and exposures for certain critical occupations, MSHA has to be able to track the movement and use of such equipment in order to determine whether its dust standards are being complied with. However, in the instant cases there is no credible testimony or evidence to establish that the failure to accurately report the changes required by the cited standard in fact had a serious impact on miners. Accordingly, I have no basis for finding or concluding that the gravity of the violations is such as to warrant any additional increases in the penalties assessed by me for the citations.

However, given the rationale for requiring such reports, I do find that the citations were serious.

Negligence

During the course of arguments during the hearing, petitioner's counsel suggested that the respondent may have placed itself in a position of reporting certain status changes well after the three-day reporting deadline because it did not want to continue taking certain dust samples during the required sample cycle. In short, counsel implied that the respondent "took the lesser of two evils" because it was attempting to avoid a dust sampling cycle which may have shown the mines to be out of compliance. Respondent's representative vigorously denied any such suggestion.

After scrutiny of the record in this case, I find no credible testimony or evidence to establish that the respondent was attempting to circumvent or avoid the respirable dust requirements found in Part 70 of MSHA's regulations. Further, if the petitioner believed this was the case, it was incumbent on counsel to produce the witnesses to support such a proposition. Since it did not, I have ignored any such suggestions.

In each of the citations originally issued by Inspector Lyle, he made no negligence findings on the face of the citations. That is, he did not check any of the boxes provided in item 20 of the citation form. The boxes contain five degrees of negligence ranging from "none" to "reckless disregard." The record here establishes that the citations were subsequently modified 52 days later to reflect a "high" degree of negligence, and as a result of that the citations were "specially assessed" by MSHA's assessment office, with the resulting civil penalty monetary assessment of \$300 for each citation, totalling \$1500.

Inspector Ridley testified that he modified the citations issued by Mr. Lyle on January 7, 1983, some 52 days after they were issued, and he did so at the specific direction of supervising MSHA Inspector Charles Dukes. Mr. Ridley stated that Mr. Dukes instructed him to modify the citations to show a "high degree of negligence." When asked why Mr. Dukes did not issue the modifications himself, no explanation was forthcoming, and Mr. Ridley confirmed that the modifications were mailed to the respondent. I find Mr. Ridley's assertion that he would have made an independent judgment that the respondent exhibited a high degree of negligence to be self-serving, and they are rejected.

Respondent argued that the manner in which the citations were modified in these proceedings was unfair and arbitrary since they were issued some 52 days after the citations were

issued. Further, respondent asserted that Mr. Ridley's modifications indicating that the respondent's negligence was high were not based on Mr. Ridley's personal evaluation and that Mr. Ridley simply carried out a direct order from his supervisor to amend and modify the citations. As a result of this, respondent asserted that all of the citations were "specially assessed."

MSHA's Inspector Manual Guidelines requires an inspector to complete the appropriate "Inspector's Statement" portion of the citation form to be completed as soon as possible during the same day when the violation is cited. The instructions advise that the inspector should fill in the portion of the statement which relates to gravity and negligence while the facts are fresh in his mind. The instructions also state that failure to adequately document the Inspector's statement will result in assessments that are inaccurate, either too high or too low, and thus ineffective.

Based on all of the testimony and evidence presented at the hearings in these cases it is my opinion that the statement made in MSHA's Narrative Findings for a Special Assessment that "the proposed penalty reflects the results of an objective and fair appraisal of all the facts presented" is simply not so. The sequence of events leading to the issuance of the citations leaves much to be desired. One inspector issued the citations based on record searches made by a second inspector. A third inspector modifies the citations based on direct orders from a fourth inspector who happens to be his direct supervisor. Further, there is no rational explanation as to why the first inspector made no negligence findings as required by MSHA's Inspector's Manual Guidelines (exhibit R-1), nor is there any explanation as to why Mr. Dukes did not modify the citations himself. The record reflects that he is an authorized inspector and has the authority to issue citations.

During the course of oral arguments in this case, respondent's representative suggested that Supervisory Inspector Dukes' role in the modification of the citations, as well as the instructions given to Mr. Travis as to when he should file the reports which resulted in the citations, was somehow out of retaliation for some personal grudge which Mr. Dukes purportedly harbored toward the respondent (Tr. 133-138). Respondent's representative was reminded from the bench that I view such accusations as serious matters, and that any suggestion that any MSHA official may have acted improperly should be directed to that agency.

In view of the foregoing, and on the basis of all of the credible testimony of record in these proceedings, I conclude that the violations resulted from the respondent's failure to take reasonable care to insure that the status forms in question were timely filed. While the record suggests that Mr. Travis may have acted in good faith and may have been misled or mistaken as to what was required of him, I am not convinced that mine management was totally oblivious as to the requirements of the regulations. I find that the citations all resulted from ordinary negligence by the respondent, and this is reflected in the civil penalties which I have assessed for the violations.

Good Faith Compliance

The citations issued by Inspector Lyle reflect that abatement and compliance was achieved the same day the citations issued, and that this was done by the respondent filing "up to date" status change forms to accurately reflect the status of the mining units in question. Accordingly, I find that the violations were rapidly abated prior to the time fixed by Inspector Lyle, and this is reflected in the penalties assessed by me for the violations.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business.

Aside from some testimony that certain sections of the mine in question may have had a daily production of 700 tons, and that MSHA's "narrative statement" in support of the proposed assessments makes some nebulous references to the size of the mine and Pyro Mining Company, there is no direct testimony or evidence in this case as the coal production or size of respondent's Wheatcroft Mine. However, based on testimony presented in another proceeding where these parties and counsel were present (Docket KENT 83-101, heard November 2, 1983, in Evansville, Indiana), I conclude and find that the respondent is a fairly large mine operator and that the penalties assessed by me in these proceedings will not adversely affect its ability to continue in business.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of Section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Docket No. KENT 83-186


<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2075605	11/16/82	70.220	\$75
2075606	11/16/82	70.220	\$75

Docket No. KENT 83-187

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2075602	11/16/82	70.220	\$75
2075603	11/16/82	70.220	\$75
2075604	11/16/82	70.220	\$75

ORDER

Respondent IS ORDERED to pay the civil penalties assessed above in the amounts shown for each of the citations, and payment is to be made to the petitioner within thirty (30) days of the date of these decisions. Upon receipt of payment, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 7 1984

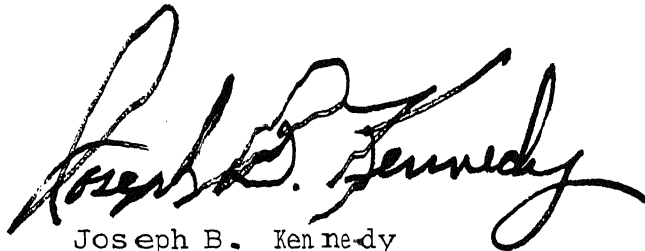
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-245
Petitioner	:	A.C. No. 15-11601-03504
	:	
	:	No. 5 Surface
BROAS MINING COMPANY,	:	
Respondent	:	

DECISION

Before: Judge Kennedy

The operator having failed to show cause why its failure to respond to the pretrial order in this matter should not be deemed a default, it is found said dereliction is a default that authorizes entry of a summary order assessing the proposed penalty as a final order of the Commission. 29 C.F.R. 2700.63.

The premises considered, therefore, it is ORDERED that the operator pay a penalty of \$206.00 for the violation charged. It is FURTHER ORDERED that the operator pay the penalty assessed, \$206.00, on or before Friday, February 17, 1984 and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 7 1984

UNITED STATES STEEL CORP.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 83-160-R
v.	:	Citation No. 2132552; 3/16/83
	:	
SECRETARY OF LABOR,	:	Gary No. 50 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Contestant;
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the contestant against the respondent pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging a section 104(a) citation issued by an MSHA inspector on March 16, 1983, citing the contestant with an alleged violation of mandatory standard 30 CFR 75.301.

The respondent filed a timely answer asserting that the citation was properly issued, and pursuant to notice, a hearing was convened in Beckley, West Virginia, on October 5, 1983, and the parties appeared and participated fully therein. The parties filed post-hearing briefs, and the arguments presented therein have been carefully considered by me in the course of this decision.

The Section 104(a) Citation No. 2132552, which is the subject of this proceeding, was issued by an MSHA inspector

on March 16, 1983. The citation alleges a violation of mandatory standard 30 CFR 75.301, and the condition or practice alleged by the inspector to be a violation of that standard states as follows:

Based on the results of laboratory analysis of samples taken on 2/8/83 and 1/27/83 at the No. 1 A-Panel Bleeder Tap (Back Side) the volume per centum of carbon dioxide was 0.65 (2/9/83) and 0.72 (1/27/83) which is above the allowed limit of 0.5.

30 CFR 75.301 states in pertinent part as follows:

All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes.
* * *

Issues

The critical question presented is whether or not the cited condition or practice constitutes a violation of mandatory standard section 75.301. Included as part of any determination of that question is whether or not the violation and/or the sampling made by the inspector to support his citation occurred in "active workings" as stated in section 75.301. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 CFR 2700.1 et seq.

Testimony and Evidence Adduced by Respondent MSHA

MSHA Inspector Melvin C. Harper, testified as to his background and training and he confirmed that he issued the citation in question. He stated that he took the bottle

sample approximately one foot to two feet outby from the regulator "at midstream." By "midstream," he explained that he placed his bottle sampling device halfway down the regulator and "straight out from it" for a distance of one to two feet. He described the regulator as a cinderblock stopping with a metal door regulator in it (Tr. 51-53).

Mr. Harper stated that on the day of his inspection he was part of an MSHA group ventilation saturation inspection, and he described the procedures he followed in taking his air sample. He took one sample on January 27, 1983, the results of which indicated .72 per centum of carbon dioxide, and he was accompanied by Cecil Berge, a U.S. Steel safety inspector. Mr. Harper could recall no protest from Mr. Berge as to where the sample was taken (Tr. 56).

Mr. Harper stated that he considered the location where he took his sample as being within "active workings," and when asked why, he replied "From all training and instructions I've had, the active workings begin at the outby side of the bleeder tap." He also confirmed that the air sample he took was a sample of air coming through the regulator at the bleeder evaluation point before it mixed with any other air. He estimated the distance from the air split where he took his sample to the split of air where it mixed with the air in the entry as 25 to 30 feet (Tr. 57).

Mr. Harper stated that he was familiar with the approved mine ventilation plan "to a certain extent," and he stated that the location where he took his sample is indicated on the mine map as an "evaluation point" or "BEP" (exhibit G-2, Tr. 58-59). He explained the three arrows on the map as two open entries with no regulators, and the third arrow as the regulator where he took his sample. He confirmed that he took samples at the other two locations and that they were in compliance (Tr. 60).

Mr. Harper stated that the regulator location where he took the sample was "the location to the gob itself." He placed the regulator approximately thirty feet from the crosscut that parallels the gob line (Tr. 60).

Mr. Harper testified that after he mailed his air sample to MSHA's Mt. Hope District Office for analysis he heard nothing further until March 16, 1983, when he received a telephone call from his supervisor Jimmy Humphrey who instructed him to issue the citation in question. Since that time he has not been back to the mine to take any other samples at the bleeder evaluation point in question (Tr. 62).

On cross-examination, Mr. Harper stated that carbon dioxide is not an explosive gas, and it was his understanding that up to two percent methane was permitted to be present at the location where he took his sample before there would be any methane violation (Tr. 62-63). He could not state whether anyone from MSHA had the results of his air samples within a week or two after he took them on January 27, 1983 (Tr. 65). He confirmed that he held his sampler at arm's length away from his body for a distance of approximately three feet, and he was standing sideways with neither his face or his back to the regulator (Tr. 66).

Mr. Harper defined "return air" as active air leaving the last working place and dumping into the main air course. He considers a "bleeder" to be air coming out of a gob area that has been worked out. He also indicated that he accepts the ventilation plan's location of the bleeder evaluation (Tr. 67).

Mr. Harper reviewed the last sentence of mandatory safety standard criteria section 75.316-2(e)(2) which states "Such systems should extend from active pillar line of such gob to the intersection of that bleeder split with any other split of air, and shall not include active workings." He was asked whether the area in which he took his sample fits the area described by the referenced sentence. He answered "no," and said "I believe that right at that regulator point is the split, the separation between the air coming off the gob then entering into the rest of the return" (Tr. 68).

When asked whether the area where he took his air samples was part of the bleeder system that extended from the active pillar line of such gob to the intersection of that bleeder split with any other split of air Mr. Harper again answered "no." He said "I think the bleeder is from the regulator back. Once it comes to there, it enters -- that is the immediate bleeder coming off that gob area" (Tr. 69). The parties stipulated that the area where the samples were taken was "in the crosscut, some point between the crosscut and the regulator, because the two splits would join. I don't know that we could say on any given day where that mixing point is" (Tr. 70).

Mr. Harper estimated that from where he took his sample, it was some thirty feet to where the air coming from the gob mixed with the air in the return (Tr. 71). He confirmed that the bleeder check points shown on the mine map are those submitted and finally approved by MSHA, and he confirmed that he learned through hearsay that mine management has indicated to MSHA that bleeder check-points are not the proper place to take the air samples required by section 75.301 (Tr. 71).

Mr. Harper stated that section 75.305 requires the fire boss to travel weekly to the area where he took his air samples for the purpose of conducting his weekly examinations required by that section (Tr. 72). However, section 75.305 does not require the taking of any bottle air samples (Tr. 76).

Mr. Harper could not recall the size of the opening in the regulator at the location where he took his sample, but he did indicate that "the doors were pretty well all the way open," and that the opening would be three to six feet. He could not state exactly how much air was coming through the regulator from the gob, and he has been unable to locate his notes (Tr. 103). He did not take an air reading in the return entry (Tr. 104).

MSHA Inspector Jackson L. Snyder, testified that he is assigned to the district ventilation group and that in that capacity he reviews the ventilation plans submitted by operators and evaluates their effectiveness (Tr. 108). Mr. Snyder confirmed that he was at the mine in question on February 9, 1983, and took a bottle sample of air similar to the one taken by Inspector Harper. He stated that he took his sample at the same bleeder check point where Mr. Harper took his. He took it approximately one foot outby the regulator, downstream, and at arm's length (Tr. 110).

Mr. Snyder stated that the air he sampled was air from the regulator and he did not believe that the air which he sampled was mixing with other air in the entry. He considered the sampling location to be in active workings because "it is required, by the ventilation plan, that the bleeder point be at this location. And it is also required that this person go to this location once a week to evaluate that part of the gob" (Tr. 110).

Mr. Snyder stated that men travel to the bleeder check points once a week to take air samples with bottles, evaluate the direction of the air flow, as well as the quality of the air and the presence of any methane or gases. While there is no requirement to take bottle samples, U.S. Steel has chosen to use this method to insure conformance with their own ventilation plan (Tr. 111).

Mr. Snyder confirmed that he was at the mine to evaluate the gob area as part of his ventilation survey and that the volume of air in the entry outby the bleeder evaluation point was 43,000 cubic feet, and the amount of air coming off the gob was approximately 3900 (Tr. 113). The amount of air present when the citation was abated was 8,000 cubic feet (Tr. 114).

On cross-examination, Mr. Snyder stated that U.S. Steel safety inspector Earl Stone was with him when he took his sample on February 9, 1983. The opening in the regulator was 40 square feet (Tr. 115). He took no air readings in the intersection where the air from the regulator mixed with the return air (Tr. 116). However, he approximated the air movement there as 15,000, and he did not believe that there was any mixture of return and bleeder air at the point where he took his bottle sample (Tr. 117).

Mr. Snyder stated that any bleeder entries which are part of the approved mine ventilation plan would be bleeder entries in conformance with section 75.316 (Tr. 119). He indicated that he had no conversations with mine management as to where the bleeder check points should be before the plan was approved, and he does not know what was originally proposed by mine management in this regard (Tr. 120).

Mr. Snyder stated that he "supposed" he received the results of his air sample within a week and that it took him until March 16 to issue the citation because he ran across it while he was preparing his report on the mine ventilation survey (Tr. 145). When asked whether it was true that within his district there is a lot of controversy as to whether section 75.301 applies to bleeder check points in bleeder entries, he replied "at a certain time, yes, there was" (Tr. 145). When asked whether it is still true that there are certain inspectors in his district who do not believe that section 75.301 applies to bleeder check points and a bleeder entry, he answered "I don't know that." He believes that it does apply (Tr. 146).

Mr. Snyder stated that when his air sample indicated noncompliance he asked Mr. Harper to take care of issuing the citation (Tr. 148). Mr. Snyder confirmed that he was aware of MSHA's policy letter, exhibit G-3, at the time the citation issued, but he did not know whether Mr. Harper was aware of it (Tr. 149).

Paul J. Compton, MSHA Division of Safety, Arlington, Virginia testified as to his background and experience, and he confirmed that his present duties include assisting the division chief in matters concerning ventilation (Tr. 156-159). He commented as to the importance of measuring bleeder air, and he indicated that the "BCP" or bleeder check point location shown on the mine map is the point where undiluted air coming from the bleeder is sampled and that is what MSHA is trying to achieve (Tr. 164).

Mr. Componation was asked about his "concerns" with respect to the question of interpretation of "active workings at a bleeder evaluation point," and he responded as follows (Tr. 168-169):

A. My concern -- I have no concerns with it. I feel that if a man has to travel there, it has to be safe for him to travel. I don't only feel that it's 301 and the CO₂, as we have in this case here, I think he's responsible to see that the roof is supported, that the area is adequately ventilated, and that it's safe for whoever goes up there to evaluate that, for whatever they're evaluating; whether it be for the roof, whether it be for anything that's in there, not necessarily methane. He is evaluating the effectiveness of that system to determine whether the gob, per se, is being ventilated accurately.

And he measures the quantities of air, he checks the roof, he checks for whatever may be. He may be checking for CO₂; he may be checking for CO, as we do in many, many mines, where we have spontaneous combustion and so forth; or he may be checking for any number of gases that could exist in coal mines. But he had to, also, make sure that it's safe, as I say, from roof support and everything else.

Asked whether the bleeder evaluation point is an alternative to inspecting the bleeders, Mr. Componation responded as follows (Tr. 169-170):

Q. Mr. Componation, is the bleeder evaluation point an alternative to inspecting the bleeders?

A. Only if the bleeder becomes unsafe for reasons beyond the control of the operator. The operator, under two hundred, is responsible to support the top throughout the coal mines. He has to make a reasonable -- or make a diligent effort to maintain the bleeders, to support them, to be able to travel them. And, as I say, there are circumstances that occur in every coal mine in certain areas where it becomes difficult, maybe impossible, maybe he has it cribbed and maybe the ribs are sloughing in, or maybe it's of a nature that breaks around. Those conditions develop; that recognizes that could develop, and allows them to evaluate at the point -- to the point where it is safe to travel. And, as I say,

following legislative history, that is not, in my opinion, for all times. That is until such time as that area can be safely mined out and then sealed. Or if anytime it becomes apparent that the ventilation is inadequate, for whatever reason, it doesn't only have to be methane. It can be for any reason. If it's ineffectively ventilated, then the area has to be sealed.

When asked why MSHA cannot agree to placing a bleeder evaluation point 100 feet outby where it was located in this case, even after 2300 or 43,000 CFM's of air was sweeping through that point, he responded as follows (Tr. 172):

A. Because I could have any amount of any explosive, noxious, or poisonous gases accumulating just in by the point where I'm measuring, diluting it as it comes out. And I could have a condition exist that would be an extreme hazard to the men in the coal mine.

When asked whether the issues concerning "samples taken in active workings and whether it has to be in compliance with 301," has been discussed with industry and MSHA personnel, Mr. Compton responded as follows (Tr. 173-174):

A. Yes. We have discussed this many times in staff meetings. We've discussed it in meetings with BCOA, the national coal association, various coal operators associations. We have discussed this with them. We have never had adverse response.

Q. Are you aware of a division of opinion at the district manager level in MSHA on this question?

A. Not in the sense that it's strictly a difference of opinion, but anytime you put twelve people together, some have different thoughts on things. But we have never had anything to say that we had a strong difference of opinion.

Q. Is there some reason why this letter which was sent to Mr. Krese by Mr. LaMonica, Exhibit 3, in the summer of '81, has not been issued as an MSHA policy document?

A. The reason it wasn't issued as an MSHA policy document is because we've had no questions or no problems with it. And I don't think it was issued as a -- strictly a problem, even in district four. Often times in discussions with management, and even among -- we get many of the same with personnel within the agency; where people have ideas and they express them, and in order to come to one uniform interpretation, you may say, or just to affirm something, we'll put those out.

And it's not uncommon to respond to our district people. We have responded to many coal operators without saying it's a policy and issue those to every one. We address the question to the particular individual because it's not a question to other people.

On cross-examination, Mr. Compton confirmed that he drafted exhibit G-3, and when asked to reconcile section 75.316(e)(2) and the interpretation stated in the letter, he responded as follows (Tr. 176-177):

A. I interpret that active working to refer to the active workings from which the air is coming; the pillar line at the outby side of the gob. I interpret that to say that the air that flows across the active area, flows across the gob and then into the bleeders. And my interpretation that the bleeders are active so long as they have to be traveled. And we do, as a matter of -- I don't say it's policy -- but we do as matter of it being active when bleeders are traveled; we collect samples in the bleeders and we do enforce the same regulation that we enforce at the ventilation point.

Q. Mr. Compton, is there anywhere in the regulations where bleeders are defined as active workings?

A. There are very few places where any particular entry is defined as an active working. Active workings are defined as any place where men work or travel, regardless of whether you call it a bleeder, whether you call it a track entry, whether you call it a return entry, or an intake entry. If the man works and travels, it's active.

Q. Mr. Compton, how do you define what a bleeder entry is?

A. The bleeder entry is a special air course, by design, to carry the products of gob areas away from the active area, which is a pillar line outby, through the bleeder system and into the return airways and to the ventilation system, to the surface.

Q. How can a bleeder entry carry gases away from the active workings, if they are active workings?

A. Away is a relative term.

Q. Relative to what?

A. To where you are taking it from. When you talk about away, you're talking away from the active area.

Mr. Compton stated that the reason air readings are taken at a bleeder evaluation point is to determine if the gob is effectively ventilated. If it is, he indicated that it would be in compliance with the requirements of the regulations (Tr. 188). In response to further questions, he testified as follows (Tr. 198-200):

Q. Mr. Compton, if you made the evaluation after the bleeder air was diluted, why would it then be hazardous?

A. I didn't say it would be hazardous. It wouldn't tell me what is in the bleeder area. It wouldn't tell what's coming through the bleeder entries off the gob. It would tell me --

Q. Why --

A. -- what's coming from other areas also.

Q. Why is it important to know what's coming from the gob?

A. Because I could have a condition existing in the gob area that is very hazardous and bring that out and dilute it, and not recognize it, and the hazard exists. But, I don't know it.

Q. So, you agree that it's in everybody's interest to take a reading of the undiluted bleeder air?

A. I -- I don't like the way you asked the question. I don't know what everyone's interest is.

Q. Well, don't you believe --

A. I'm hoping it's safety. And if it is safety, then it is important.

JUDGE KOUTRAS: Isn't that what the inspectors did in this case? They took a reading of the undiluted air? Isn't that what they did?

MS. SYMONS: Yes.

JUDGE KOUTRAS: Okay.

BY MS. SYMONS:

Q. Mr. Compton, isn't it true that, according to your theory, any time anyone takes that reading, it makes it into active workings?

A. That isn't my theory. That is a 301 -- or the definition of active workings says: where they have to work or travel. I didn't make that definition.

Respondent MSHA's Arguments

In its post-hearing brief, MSHA asserts that the key issue in this case is the interpretation of the words "active workings," and whether the air which leaves a bleeder evaluation point must comply with the air quality requirements of 30 CFR 75.301 at the location such air leaves the gob and enters a return (Tr. 94, 219-223).

In support of its case, MSHA cites the definition of "active workings" found at 30 CFR 75.2(g)(4), as follows:

'Active workings' means any place in a coal mine where miners are normally required to work or travel;

MSHA also cites the definition of "active workings" as found in the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior, Bureau of Mines, 1969, at page 11, as follows:

'Active workings.' All places in a mine that are ventilated and inspected regularly [U.S. Bureau of Mines Federal Mine Safety Code-Bituminous Coal and Lignite Mines, Pt. 1 Underground Mines, October 8, 1953.]

In support of its argument with respect to the application of the words "active workings" to an entry inspected only regularly, but otherwise not used in the active extraction of coal, MSHA cites a 1972 decision of the former Interior Board of Mine Operations Appeals, Mid-Continent Coal and Coke Company, 1 IBMA 250, decided December 29, 1972, where the Board stated as follows at 1 IBMA 257:

Since the operator is charged with the duty of regular inspection of high-voltage cable, it can be inferred that a miner or miners normally work and travel in this entry. The Board concludes that the entry is subject to the requirements of Section 75.400 of the Regulations [Section 304(a) of the Act] because it does constitute an 'active working.' Even though it may be that only one miner is required to regularly inspect the entry, an accumulation of coal dust is a potential hazard to him, and clean up procedures are therefore warranted. * * * (Emphasis added.)

In further support of its position in this case, MSHA cites a decision by former Commission Judge John F. Cook, in Christopher Coal Company, MORG 76-8-P, decided on October 18, 1976, slip opinion at page 10, aff'd by the Commission on October 25, 1978, IBMA 77-7, first unnumbered volume March 1979. Judge Cook upheld a violation of mandatory standard section 75.329, which regulates methane in bleeder entries and returns, and supported MSHA's position that the air sample was properly taken at a location after leaving a pillared area and prior to entering another split of air. Judge Cook stated as follows at page 10 of his decision:

It is clear that the test must be made before the bleeder air actually leaves the bleeder split of air and joins with the main return split of air. To interpret the regulation any other way would make it meaningless since the test, under the operator's theory, would

only indicate what the methane content was in the main return after a mixture took place. The regulation clearly was designed to ascertain what methane content would be entering the main return split of air.

Conceding the fact that the Christopher decision involved a standard dealing with methane in bleeder entries and returns, whereas the cited section 75.301 in the instant case deals with carbon dioxide in active workings, MSHA nonetheless argues that the air sample is used for both purposes and that the logic advanced to support the location of the Christopher samples likewise is applicable in this case.

MSHA points out that the citation issued in this case noted that on two occasions when samples were taken in January and February that the carbon dioxide levels were above .5 percent. The citation required that the carbon dioxide levels be lowered to below .5 percent, which was achieved when U.S. Steel increased the quality of ventilation through the pillared area from around 1200 cfm (Tr. 102) to around 8,000 cfm (Tr. 114, 118-191).

MSHA submits that the location involved is always considered to be active workings as long as "miners are normally required to work or travel" to it. Consequently, even when a miner is not present at a location in the mine, the fact that a miner must at some point work or travel to the location makes that location active workings 24 hours a day, 365 days a year (Tr. 209-211). It does not shift back and forth between active and inactive just because a miner is not always present. The fact that he must work or travel to the location mandates its active status.

MSHA further asserts that it is clearly important to evaluate the effectiveness of a mine's bleeder system, and that regulatory standard section 75.316-2(f)(2), requires that bleeder entries which cannot be traveled must be evaluated. MSHA makes the point that the issuance of the citation in this case is based on MSHA's position that the air leaving the gob area must be in compliance with section 75.301, at the point where it enters the return because the regulator at the bleeder evaluation point is the line separating the untravelable gob area and the traveled return area of the mine. MSHA concludes that the fact that miners are required to work in the area mandates that the air quality requirements of section 75.301 are applicable.

MSHA maintains that the contestant's reliance on the language found in Section 75.316-2(e)(2), that bleeder systems

shall not include active workings, is not well taken. In support of its conclusion, MSHA relies on the testimony of Mr. Compton (Tr. 176), as well as its argument that the intent of the words "active workings" at the end of said regulation relates to the fact that bleeder air systems are not to cross active working sections or faces on their way to the return after leaving the active end of a pillar line, and that it was never intended to deprive the miner who must evaluate the bleeder of the protection provided by 30 CFR 75.301.

MSHA concludes its argument by asserting that its interpretation of the law must be followed, and that the cases cited at page 7 of its brief support its broad application of the term "active workings" as found in sections 75.2(g)(4) and 75.301, and that any narrow or limited construction as argued by the contestant should be eschewed. MSHA submits that the citation in question was properly issued and that section 75.301 is applicable to the air quality allowed at a bleeder evaluation point.

Contestant's Arguments

In its post-hearing brief, the contestant argues that notwithstanding the definition of "active workings" found in 30 CFR 75.2(g)(4), in view of the language found in 30 CFR 75.316-2(e)(2), which seemingly excludes a "bleeder systems" from "active workings," a regulator in a bleeder entry 25 to 30 feet from the intersection where the air mixes cannot be considered "active workings."

In support of its argument, the contestant points out that under section 75.316-2, the whole purpose of having bleeder entries is to continuously move air-methane mixtures from the gob, away from active workings, and to deliver such mixtures to the return air courses. Contestant suggests that there is no way this may be accomplished if section 75.301 is applied to the bleeder entry because there is no way the air-methane mixture can move from the active workings to the return air courses unless it goes down the bleeder entry.

In response to MSHA's argument that section 75.316-2(f)(1) deals only with roof control in bleeder entries, contestant asserts that roof control is never mentioned. In response to MSHA's concern that the oxygen level decreases as the level of carbon dioxide increases, contestant points out that the foreman or fireboss checking the area has a flame safety lamp which would detect a low oxygen level, and that the plain

language of section 75.316-2(f)(2) indicates that it can deem the area unsafe for examination for any reason and take other steps to measure the effectiveness of the movement of air from one area to another. The contestant points out further that there is no other regulation which allows an operator to declare an area unsafe to travel, and that the bleeder entry is also the only area of a coal mine where methane is allowed to be at 2.0%.

On the facts of this case, the contestant contends that the only reason the bleeder evaluation point is at the regulator is because MSHA "forced the company to put it at this location." Contestant asserts that if one wants to sample the air as it comes off the gob, the bleeder evaluation point is the logical place to take the reading before that air has a chance to mix with return air. Contestant also points out that there is no requirement in the Act that air from the gob be measured or sampled at the bleeder evaluation point other than what MSHA has imposed through the ventilation plan, and that there is no question that the fireboss could take the methane reading at the intersection.

Contestant suggests that the only point in having the bleeder evaluation point at the regulator is that someone has to walk it, and this fact makes that location an "active working" under MSHA's theory. Contestant suggests further that there are two ways to handle the problem. One way is to move the bleeder evaluation point to the intersection where the air mixes with the return, and contestant concedes that this will not give as accurate a reading of the air-methane mixture from the gob. A second way is to assume that MSHA meant what it said when it specifically stated that the bleeder entry is the area where air moves from the active pillar line to the intersection with the return and it not active workings. Contestant emphasizes the fact that pursuant to Section 75.316-2(f), MSHA expected travel in this inactive area of the mine, and contestant suggests that the second method is the more logical solution and meets the needs of the parties as well as preserving the safety of the miners.

Finally, contestant asserts that MSHA should not be permitted to ignore the definition of "bleeders" as defined in its own regulations. As for MSHA's suggestion that it seal the gob, contestant states that this argument totally ignores the fact that MSHA has no authority to request a gob be sealed unless methane or explosive gases are a problem (30 CFR 75.329 et. seq.). Contestant states that carbon dioxide is not an explosive gas. Since a bleeder entry is specifically defined as an area that is not in active workings, contestant concludes that section 75.301 does not apply and that the citation should be vacated.

Findings and Conclusions

Fact of Violation

The contestant in this case is charged with a violation of mandatory standard Section 75.301, for an alleged failure to maintain the carbon dioxide level at the cited bleeder location at or below the level stated in that standard. The cited standard does not specifically address the air quality required to be maintained in bleeder entries. It simply requires that all active workings be ventilated in such a manner as to prevent "not more than 0.5 volume per centum of carbon dioxide."

MSHA's position in this case is that the quality of air passing through bleeder areas and leaving a bleeder evaluation point must comply with the requirements of section 75.301. In order to reach this conclusion, MSHA must establish that the cited bleeder entry and evaluation point in question is in fact part of the "active workings" of the mine. In support of its theory of this case, MSHA relies on the interpretation of the term "active workings" found in the definitions section of its regulations, namely section 75.2(g)(4), and a prior decision by former Commission Judge Cook in Christopher Coal Company, supra, interpreting mandatory section 75.329.

It seems clear to me that the intent of section 75.301, is to insure that active workings of the mine are properly ventilated by air currents which do not contain oxygen and carbon dioxide levels outside of the parameters fixed by that standard. Further, the standard is also intended to insure sufficient air volume and velocity to dispel flammable, explosive, noxious, and harmful levels of gas, dust, or fumes. In the instant proceedings, the contestant's assertion that carbon dioxide is not a harmful, explosive, or hazardous gas is not rebutted by MSHA. Further, section 75.301-2, specifically excludes carbon dioxide from the TLV method of determining harmful concentrations of noxious gases. Section 75.301-5, does not list carbon dioxide among other explosive gases required to be controlled. The problem is that the regulatory scheme encompassed by section 75.301, and the criteria subsections which follow, does not mention bleeder entries or bleeder systems. That subject is covered by sections 75.329 and 75.316-2(e) through (i).

Mandatory standard section 75.320, requires that bleeder entries or systems used to ventilate wholly or partially extracted and abandoned pillar areas be ventilated or sealed.

If ventilated, the standard requires that such ventilation be maintained "so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases." Similar language is found in section 75.316-2(e)(1), which specifically defines "bleeder entries" in pertinent part as "special aircourses . . . designed to continuously move air-methane mixtures from the gob, away from active workings and deliver such mixtures to the mine return aircourses."

On the facts of the instant case, MSHA's reliance on the Christopher Coal Company case in support of the citation is rejected. The requirements for controlling and dissipating methane in bleeder areas as encompassed by section 75.329, are different from the requirements found in cited section 75.301, which addresses carbon dioxide, and I conclude that the two standards are mutually exclusive. MSHA's attempts to use them interchangeably are rejected. It seems to me that if MSHA wishes to promulgate a mandatory standard requiring the quality of air in bleeders to be maintained at the same levels and requirements as air in "active workings" as specifically covered by other mandatory standards, it should amend its regulations to clearly and directly state this proposition, rather than attempting to "boot strap" its enforcement by reliance on theories which simply do not make sense.

MSHA's reliance on the definition of "active workings" to support the citation issued in this case is likewise rejected. Contestant's arguments in support of its conclusion that when read together with the other standards found in Part 75, a bleeder entry is not active workings is a sound and logical interpretation and application of the cited standard in case. As correctly pointed out by the Contestant here, the specific purpose of bleeders is to provide a system and means for removing the air which is used to ventilate gob areas from the mine. Testing that air at the the regulator before it has an opportunity to mix with return air seems logical. However, the fact that an examiner must travel there once a week, or more frequently, to take methane readings, thereby placing that particular location in "active workings" in accordance with the definition of that term, may not serve as a basis for MSHA reading something into the requirements of section 75.301 which is not there.

Although Inspectors Harper and Snyder both indicated that Section 75.305, requires a fire boss weekly examination

of the area where their air samples were taken, they conceded that this section does not require the fire boss to take such samples. This seems rather strange to me. On the one hand, MSHA takes the position that requiring the fire boss to travel to that area at least once a week places him in "active workings" by definition. Once the fire boss is there, he is not required to take any air samples to determine the air quality in those areas covered by this section. Inspector Snyder reasoned that the mine ventilation plan requires this weekly examination. This supports the contestant's assertion that MSHA's insistence that its plan include this provision has in effect placed the fire boss in "active workings," thereby supporting MSHA's desire that the bleeder air conform with the requirements of section 75.301.

Inspector Snyder conceded that the question of whether section 75.301 applies to bleeder entries or bleeder check points has been a matter "of controversy" among his fellow inspectors at the MSHA district level. Even though he denied any knowledge of the fact that some inspectors do not believe that section 75.301 applies to such areas, it seems to me that such doubts should be resolved so as to insure even-handed enforcement. However, in this case, since the contestant raised the issue, it was incumbent on the contestant to establish this assertion through some credible testimony or evidence. Simply raising the issue will not suffice. Since the contestant has not done this, I have given this little weight. However, I have not totally discounted Inspector's Snyder's statement that there may well be a difference of opinion or "controversy" among MSHA's enforcement staff.


Although not directly stating so, MSHA's experienced ventilation specialist Paul Compton alluded to the fact that the application of section 75.301 to bleeder evaluation point has been a topic of concern to MSHA as well as the industry, and he implied that there may be "different thoughts on things" (Tr. 174). When asked why a Memorandum dated September 14, 1981, from MSHA's Acting Administrator Joseph A. Lamonica to District Manager James E. Krese (exhibit G-3), addressing the quality of air of air samples collected at bleeder evaluation points, has not been issued as a general MSHA policy document, Mr. Compton responded that "we've had no questions or problems with it" (Tr. 174).

The memorandum referred to above quotes the partial language of section 75.301, the definition of "active workings" found in section 75.2(g)(4), the partial language found in section 75.316-2(f)(3), stating the requirements of weekly examinations of bleeder systems where it is unsafe to travel a bleeder entry, and concludes as follows:

A bleeder evaluation point is an area of a mine where a certified person, a miner, is required to examine and conduct tests weekly. The bleeder evaluation point is an active area of the mine. A citation shall be issued when sample results at a bleeder evaluation point are not in conformance with the statutory provisions of Section 75.301, 30 CFR 75. (Emphasis added.)

I take note of the fact that the memorandum characterizes a bleeder evaluation point as an "active area of the mine." That term is not further defined. It seems to me that to obviate confusion, and to preclude controversies of the kind generated by the instant proceedings, MSHA should either publish such memorandums universally, promulgate an amended clear standard, or clarify precisely what it has in mind.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish by a preponderance and of any credible evidence or testimony that the contestant violated the provisions of cited section 75.301, when it assertedly failed to maintain the carbon dioxide level at less than 0.5 in the cited location where the inspector made his air readings. Accordingly, Citation No. 2132552 IS VACATED, and the contest IS GRANTED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 8 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 83-95
Petitioner : A.C. No. 36-00970-03515
v. :
U.S. STEEL MINING COMPANY, INC., : Maple Creek No. 1 Mine
Respondent :

DECISION

Appearances: David A. Pennington, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This case involves three citations alleging violations of mandatory safety standards. Pursuant to notice, it was heard in Washington, Pennsylvania, on November 29, 1983. William R. Brown testified on behalf of Petitioner; Joseph D. Ritz and Ira W. Seaton, Jr. testified on behalf of Respondent. Both parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. 1 Mine.

2. Respondent is a large operator.

3. The assessment of civil penalties in this proceeding will not affect Respondent's ability to continue in business.

4. In the 2-year period preceding the issuance of the citations involved herein, there were 484 assessed and paid violations at the subject mine, 430 of which were designated as significant and substantial. This history of prior violations is not such that penalties otherwise appropriate should be increased because of it.

5. In the case of each citation involved herein, the violation was abated promptly and in good faith.

6. The intake air escapeway in the 1 Main 8 Flat section was not examined between October 10, 1982 and October 20, 1982. This escapeway was the primary escapeway for two sections. Citation No. 2011054 was issued on October 20, 1982, under section 104(d)(1) of the Act, charging a violation of 30 C.F.R. § 75.1704 caused by the unwarrantable failure of Respondent to comply with the standard. The violation was designated as significant and substantial.

7. Respondent's failure to examine the escapeway was caused by a mixup in assignments when the person who would normally make the examination was assigned to other tasks.

8. The roof in the escapeway was good. There is no history of falls in the area. The floor was wet in some places, dry in others. There were no falls or blockages. Coal was being produced on the day the citation was issued.

9. Citation No. 2014004 was issued November 3, 1982, charging a significant and substantial violation of 30 C.F.R. § 75.517 because in the 7 Flat 5 Room section of the subject mine, there were exposed bare power wires in the trailing cable of the continuous mining machine. The case was submitted on the basis of the following stipulations (Findings of Fact Nos. 10 through 16).

10. All current-carrying conductors on the trailing cable were fully insulated.

11. The trailing cable carries 440 volts of power to the continuous mining machine.

12. Under Pennsylvania state law the cable must be checked before the machine is energized.

13. The cut in the cable was approximately 2 to 4 inches long. It had been taped but the tape was frayed.

14. At the time the citation was issued, the condition did not present a hazard to miners.

15. The cable has phase to phase and phase to ground protection as well as a ground fault system.

16. The condition was cited "pursuant to MSHA's policy that the Inspector should assume that the condition will not be corrected."

17. On November 16, 1982, in the 8 Flat, 56 Room of the subject mine, the roof bolters failed to check the torque on the roof bolts after they were installed. Citation No. 2014007 was issued alleging a significant and substantial violation of 30 C.F.R. § 75.200.

18. The approved roof control plan required that the roof bolter check the torque with a torque wrench on the first bolt installed in the first row, and thereafter check the torque on 10 percent of the bolts.

19. Resin roof bolts were used in the area. They are installed by drilling a hole in the roof, inserting resin tubes into the hole and inserting a resin rod into the tube. The rod is then spun for 20 to 25 seconds to permit the resin and catalyst to mix and harden. The resin "laminates" the roof, that is, it binds the strata in the roof together.

20. By checking the torque on the bolts, the bolter can determine whether the resin is hardening properly. Torquing with a torque wrench is the only safe and effective way to determine whether the resin is hardening.

21. The roof bolters did not believe that torquing was necessary in the case of resin bolts, and the foreman agreed with them. However, the foreman was not aware that the bolts were not being torqued.

ISSUES

1. Whether the violations cited were of such nature as could significantly and substantially contribute to the cause and effect of mine safety or health hazards?

2. What are the appropriate penalties for the violations?

CONCLUSIONS OF LAW

1. The failure to examine the intake air escapeway described in Finding of Fact No. 6 was a violation of the mandatory standard contained in 30 C.F.R. § 75.1704-2(c).

DISCUSSION

The citation in question charged a violation of 30 C.F.R. § 75.1704, which is the statutory standard requiring that escapeways be provided and maintained. Respondent argues that since the citation charged a violation of 30 C.F.R. § 75.1704 and not of 30 C.F.R. § 75.1704-2, it should be dismissed. To accept this argument is to exalt form over substance. There was no doubt, there is no doubt as to the nature of the violation charged. And there is no doubt that the violation occurred.

2. The violation referred to above was caused by Respondent's unwarrantable failure to comply with the standard.

DISCUSSION

The meaning of the term unwarrantable failure has not, so far as I am aware, been discussed in any Commission decision. The Board of Mine Operations Appeals in Zeigler Coal Company, 7 IBMA 280 (1975), analyzing the term in the light of the legislative history, stated that a violation is caused by unwarrantable failure if the operator "has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." This definition was specifically approved by the Senate Committee which reported out S. 717 which became in large measure the Federal Mine Safety and Health Act of 1977. "The Committee approved the recent decision of the Board of Mine Operations Appeals in Zeigler Coal Co. which liberalized the interpretation of the term 'unwarrantable failure.'" S. Rep. 95-181, 95th Cong., 1st Sess., at 32 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 620 (1978). The term unwarrantable failure is thus equated with negligence, rather than recklessness, and I conclude that Respondent was negligent in failing to see that the required examination was performed.

3. The violation referred to above was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

DISCUSSION

The issue is whether failure to examine an escapeway in accordance with the mandatory safety standards is likely to result in serious injuries. It is imperative that escapeways be maintained in underground coal mines in a manner that they

may be available and usable to escape from hazardous situations. The only way to ensure that they are so maintained is to conduct regular examinations. The fact that no roof falls or other blockages had previously occurred in this area, and that the escapeway would likely have been examined in 2 days does not address the seriousness of the failure to comply with the examination requirements. Failure to examine escapeways is a practice likely to result in serious injuries to miners.

4. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is \$300.

5. The condition described in Finding of Fact No. 9 constituted a violation of 30 C.F.R. § 75.517 since the wires on the trailing cable were not adequately insulated.

6. Since the parties have agreed that at the time the citation was issued it did not present a hazard to miners, I conclude that the violation was not significant and substantial, nor was it serious.

7. There are no facts from which I could conclude that the violation was the result of Respondent's negligence, and therefore I conclude that it was not.

8. I conclude that an appropriate penalty for this violation is \$30.

9. The condition or practice described in Finding of Fact No. 16 constituted a violation of the approved roof control plan and therefore of 30 C.F.R. § 75.200.

10. The violation referred to above was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

DISCUSSION

There is a difference of opinion as to the necessity and value of torquing resin bolts. The Federal inspector stated that checking the torque with a torque wrench is the only safe and adequate way to determine whether the resin is hardening properly. Respondent, and apparently its roof bolters, do not agree. Since the approved roof control plan, which was prepared and submitted for approval by Respondent, requires that resin bolts be torqued, I am accepting the opinion of the inspector. Failure to determine whether the resin has hardened is likely to result in serious injuries to miners.

11. There is no evidence that Respondent knew of the practice in question, but I conclude that it should have known of it in view of the reaction of the roof bolters to the citation.

12. I conclude that an appropriate penalty for this violation is \$200.

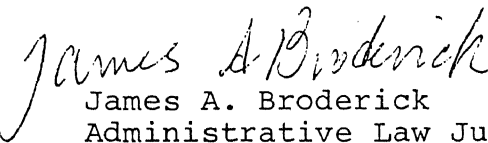
ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED

1. Citation Nos. 2011054, 2014004 and 2014007 are AFFIRMED, but the significant and substantial designation is removed from Citation No. 2014004.

2. Respondent shall within 30 days of the date of this decision pay the following civil penalties for each of the violation found herein to have occurred:

<u>CITATION NO.</u>	<u>PENALTY</u>
2011054	\$300
2014004	30
2014007	<u>200</u>
Total	<u>\$530</u>


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

FEB 14 1984

MINERALS EXPLORATION COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	DOCKET No. WEST 80-339-RM
	:	Citation/Order No. 576877;
	:	dated, 4/29/80
	:	Docket No. WEST 80-340-RM
SECRETARY OF LABOR,	:	Citation/Order No. 576878;
MINE SAFETY AND HEALTH	:	dated, 4/29/80
ADMINISTRATION (MSHA),	:	
Respondent	:	Sweetwater Uranium Project

DECISION

Appearances: Anthony D. Weber, Esq., Union Oil Company of California, Los Angeles, California, for Contestant;
Robert J. Lesnick, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Morris

Contestant, Minerals Exploration Company, contests two citations issued by the Secretary of Labor on behalf of the Mine Safety and Health Administration, (MSHA), under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq.

After notice to the parties a hearing on the merits began on October 5, 1982 in Laramie, Wyoming.

Contestant filed a post trial brief.

Jurisdiction

The parties admit jurisdiction (Tr. 3-4).

Issue

The issue is whether contestant violated the regulation.

Summary of the Cases

MSHA Inspector Merrill Wolford issued citations 576877 and 576878. These citations are now respectively docketed in WEST 80-339-RM and WEST 80-340-RM.

The condition or practice referred to in Citation 576877 reads as follows:

Terex Scraper #2401 was being operated with the brake retarder disconnected. The control line was plugged off. The right rear service brake was worn out rubbing metal to metal. Statements by operators and checking safety records indicates these defects had been turned into the operator and had not been repaired. This vehicle is ordered withdrawn from service until repaired.

The same portion of Citation 576878 reads as follows:

Terex Scraper #2406 was being operated with the brake retarder disconnected. The control line was plugged off. The front service brakes were way out of adjustment and the rear brake quick air release did not operate properly. Statements by operators and checking safety records indicates these defects had been turned into the operator and had not been repaired. This vehicle is ordered withdrawn from service until repaired.

Each of the citations alleges that contestant violated Title 30, Code of Federal Regulations, Section 55.9-3.¹/₁

MSHA's EVIDENCE

The inspector issued these citations on the same day. In addition to various unrelated safety problems the scrapers share identical conditions: The retarder connector to the transmission of each was disconnected (Tr. 47-50, Exhibits D1, D2).

The retarders are part of a system to help control and brake the scrapers. They reverse the pressure in the transmission; this in turn slows down the input shaft in the engine. This then slows the revolutions per minute of the engine. By reducing output shaft the speed of the Terex is retarded (Tr. 50).

In addition to the disconnected retarder, the right rear service brake of Terex scraper No. 2401 was worn out. It was rubbing metal to metal (Tr. 51, 61). The inspector conducted a moving as well as static test of the brakes (Tr. 61). He crawled under the vehicle to check the worn out lining.

¹/₁ Mandatory. Powered mobile equipment shall be provided with adequate brakes.

In addition, the brake drum was badly grooved (Tr. 51). There were insufficient pads to contact the brake drums. This resulted in a lack of brakes on that wheel (Tr. 51).

The vehicle operator stated that he had reported safety defects to the company but nothing had been done (Tr. 51-52). After the inspection contestant's maintenance people said they had a hairline fracture in the brake drum. (Tr. 51-52).

The hazard presented here centers on the stopping ability of this vehicle (Tr. 52).

Terex No. 2406 (Citation 576878) had other problems. The front service brakes were out of adjustment. The inspector inserted paper under the brake drum with the brake depressed. Since he was able to remove the paper the inspector considered the brakes were not working (Tr. 53, 54). In addition, the quick air release did not operate properly (Tr. 53). The hazards in each situation were similar (Tr. 55).

Inspector Welford didn't recall if he issued verbal orders that the vehicles be removed from service. He wrote the citation sometime later (Tr. 57, 58).

The inspector didn't know if the retarders were part of the braking system referred to in any of the SAE standards (Tr. 59). Retarders work most effectively when the revolutions per minute (RPMs) are at their highest level. Conversely, they are least effective at the lowest RPMs (Tr. 60).

Inspector Welford, on occasion, will conduct more extensive moving braking tests than he did here. But, in view of the condition of the brakes, he thought any additional testing would be a hazard (Tr. 67).

Bobby Jacobsen, Edward Johnson, Rocky Anaya, Jerome Connor, George Kelly and Kenneth Evans, testified for contestant.

Bobby Jacobsen, the general maintenance foreman, a person with considerable experience, indicated a retarder on a Terex scraper bears no relationship to its braking system (Tr. 68-73). A retarder on such equipment slows down the revolutions per minute. It thereby slows the speed of the engine as well as the transmission (Tr. 72).

Prior to April 29, 1980 the engines of the company's scrapers were overheating. Three of the company officials decided to disconnect the retarders. As a result there was less of a heating problem. Jacobsen has disconnected retarders under the same circumstances (Tr. 74, 76).

On the day of the inspection two Terex operators came into the yard. The inspectors said the brakes were out of adjustment. Wolford further stated that it constituted a willful violation to disconnect the retarders (Tr. 77-78).

At Wolford's request Jacobsen told him how the retarders worked (Tr. 78, 79).

Jacobsen didn't test the brakes on the scrapers because it was close to a shift change; however, Lonnie Johnson tested them. Johnson saw no problem. (Tr. 80-82, 96). Jacobsen, who got under the vehicle, saw no evidence of metal to metal rubbing on No. 2401. They'd be looking for lining touching bolts and screws (Tr. 95). You should not be able to get a piece of paper between a brake drum and a shoe (Tr. 97). In Jacobsen's opinion a vehicle is capable of having adequate brakes even though one brake does not touch its drum (Tr. 97-98).

The next day Terex representatives, assisted by contestant's mechanic, adjusted the brakes. Further, the retarders were reconnected (Tr. 80). Jacobsen didn't consider that a brake was inadequate even though the brake shoe was worn down to the metal (Tr. 89).

The first 5A 18 scrapers and the first Terex scrapers were not fitted with retarders; neither were a lot of CATERPILLARS (Tr. 75, 90).

If a scraper is moving at a high RPMs rate a proper retarder would reduce such RPMs. This, in turn, would slow the vehicle (Tr. 91). A retarder cannot totally stop a vehicle, as an adequate braking system will do (Tr. 83, 91-92).

Edward Johnson, operator of scraper No. 2406, was present during the 30 to 45 minute inspection. He participated in the brake test and answered the inspector's questions (Tr. 140-144). Johnson didn't see the inspector measure any distances and he was not advised of the results (Tr. 144). Johnson had never operated his scraper with the retarder connected but had he known it was disconnected he would have reported it as an equipment defect (Tr. 146). He thought the retarders were part of the brake system (Tr. 148).

The brakes on the scraper, confirmed by the operator's checklist, were "adequate" (Tr. 148, 154, Exhibit D3). When he marked the checklist showing the brakes not in proper condition he was referring to the retarder system (Tr. 149, Exhibit D3).

As the inspectors left, the scraper operators were told to resume work (Tr. 152).

Anaya described his scraper's brakes as "good" on flat ground (Tr. 131).

Jerome Connor, contestant's shift supervisor, indicated the inspection of the scrapers took 30 minutes (Tr. 121). The vehicles were stopped where they were inspected. The retarders were inoperative and there was some problem with the quick release air valve on the brakes (Tr. 122, 126). No citations or orders were issued when they concluded the inspection of the scrapers. Connor first heard about the citations about 4 p.m. This was after the scrapers had been returned to work (Tr. 123, 124).

Connor had tested the brakes several times. Prior to Wolford's inspection Connor had received no complaints concerning inadequate brakes (Tr. 125).

Connor told Wolford that the retarders were not the main braking system (Tr. 127).

George Kelly, an employee of Southwest Kenworth, is familiar with retarders. Except for some warranty work in 1976, he has had no relationship with contestant. Engine and transmission overheating are fairly common equipment problems. Retarders are disconnected to alleviate the overheating (Tr. 107-111, 113). Kelly recommends retarders be disconnected if the scrapers are on level ground (Tr. 111).

Retarders will not stop a Terex scraper. The retarders, useful at higher RPMs, are almost useless at lower RPMs (Tr. 112). It retards the engine and the speed of a scraper on steep grades (Tr. 114).

The Terex brake system consists of an air compressor, four air chambers, a foot pedal which operates an air valve and two brake shoes on each wheel (Tr. 116).

If a Terex was moving at 15 miles per hour a retarder could reduce its speed ten per cent (Tr. 116).

Kenneth Evans, contestant's mine superintendent, was familiar with heavy equipment as well as retarders (Tr. 100-103). The retarder's function is to help the engine slow down so it will not overspeed (Tr. 104).

Retarders have always overheated the 35E units. If used correctly the retarders reduce the RPMs (Tr. 106-107).

Discussion

The credibility determinations on these citations are mixed.

Each citation contains a common allegation that the brake retarders were disconnected. Therefore, the Secretary asserts the Terex equipment lacked adequate brakes.

On the credibility issues raised concerning the retarders I credit contestant's evidence. Its witnesses are Jacobsen, Johnson, Connor, Kelly and Evans. With a certain cohesiveness, they all confirm the view that the retarders bear no relationship to the braking system. George Kelly's testimony was particularly persuasive on these issues. He was a disinterested witness with considerable experience involving Terex scrapers.

On the other hand, it is apparent that Inspector Wolford was unsure of the function of the retarders. This is confirmed by his testimony to that effect. Further, the inspector was unsure whether the SAE standards include retarders as part of a braking system (Tr. 59).

In short, I conclude that retarders under certain conditions will reduce an engines' RPMs and, consequently, they will reduce the speed of a vehicle. However, down shifting the transmission on an automobile also will reduce its speed but no one considers that a transmission is part of a braking system.

For these reasons the allegations in each citation concerning the retarders should be stricken.

Notwithstanding the foregoing ruling on the retarders, I find a violation of the regulation in that the brakes were otherwise inadequate. On this issue I credit Inspector Wolford's testimony.

Concerning the 2401 scraper: the right rear service brake was rubbing metal to metal and worn out (Tr. 51, 61). The drum was badly grooved. Insufficient pads resulted in a lack of brakes (Tr. 51). Contestant's maintenance people discovered that a brake drum had a hairline fracture (Tr. 52).

Concerning the 2406 scraper: the front service brakes were out of adjustment, the quick air release was not operating properly; the drums, with the brake depressed, would not grab paper inserted next to the pads (Tr. 53, 55).

Jacobsen's testimony to the contrary is not persuasive. He admits he didn't test the brakes. Lonnie Johnson's evidence that he saw no problem with the brakes is, at best, hearsay (Tr. 80-82).

Jacobsen's testimony is somewhat conflicting when he states you should not be able to get a piece of paper between a brake

drum and a shoe (Tr. 97). But then he contradicts himself when he states that a vehicle has adequate brakes even though one brake does not touch its drum (Tr. 97-98). On this point I reject Jacobsen's testimony. If one of four shoes on a vehicle's brake drum do not contact the drum then such brakes are inadequate as a matter of law.

Contestant's witnesses Johnson, Connor and Anaya all confirm that Inspector Welford inspected the scrapers (Tr. 120, 136, 137, 140-144).

In its post trial brief (pages 5-8) contestant asserts that MSHA is estopped to maintain that the brakes were inadequate because of Inspector's Welford delay in withdrawing the vehicles.

I disagree. Estoppel does not generally lie against the federal government. King Knob Coal Company, 3 FMSHRC 1417 (1981); Burgess Mining and Construction Corporation, 3 FMSHRC 296 (1981). MSHA's case does not fail merely because the inspection occurred at 11 a.m. and the withdrawal order was not issued until 4 p.m. Contestant cited no authority for this position and I find none.

Contrary to contestant's arguments the weight of the evidence supports MSHA. Particularly destructive of contestant's case, as to scraper 2406, is the testimony of witness Johnson, the scraper operator. On the day before the inspection he had marked the operator's daily checklist (Exhibit D3) to indicate that the brakes were not in proper operation. His explanation was that he was referring to the retarder system (Tr. 149). The witness established no foundation to reach such a conclusion. He had never operated any equipment with retarders on it; he didn't know they were disconnected on the date of the inspection; further, he hadn't been instructed on the retarder's use. (Tr. 145, 146). For these reasons I am inclined to believe the brakes were not in proper condition.

For the foregoing reasons the notices of contest filed in each case should be dismissed.

CONCLUSIONS OF LAW

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are made:

1. The Commission has jurisdiction to decide these cases.
2. The allegations in each citation relating to the retarders on the Terex equipment are stricken.


3. Contestant violated the remaining factual allegations in Citations 576877 and 576878.

4. The notice of contest in each case should be dismissed.

ORDER

Accordingly, it is ORDERED:

In WEST 80-339-RM and WEST 80-340-RM the notices of contest are dismissed.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

FEB 14 1984

MINERALS EXPLORATION COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 80-338-RM
: Citation/Order 576874; 4/28/80
SECRETARY OF LABOR, : Sweetwater Uranium Project
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Anthony D. Weber, Esq., Union Oil Company of California, Los Angeles, California, for Contestant;
Robert J. Lesnick, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Morris

Contestant, Minerals Exploration Company, (Minerals), contests a citation issued by the Secretary on behalf of the Mine Safety and Health Administration, (MSHA), under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held commencing on October 5, 1982 in Laramie, Wyoming.

Minerals filed a post trial brief.

Jurisdiction

At the commencement of the trial contestant denied jurisdiction in WEST 80-338-RM because the case involves a contract issue (Tr. 3-4).

On this issue the evidence shows that contestant had filed the legal identity form required by the regulations and received an MSHA identification number (Tr. 16, 17). Contestant also held itself out as the operator of the property (Tr. 17).

The foregoing facts establish jurisdiction.

Issue

The issue is whether contestant is liable under the facts.

Summary of the Evidence

In this case Minerals contests Citation 576874 issued by MSHA pursuant to Section 104(a) of the Act. MSHA asserts Minerals violated 30 C.F.R. 55.4-24(b) 1/

The parties agree that a Hensel Phelps' pickup truck on this worksite was not provided with adequate fire protection. The equipment was therefore in violation of Section 55.4-24(b)(Tr. 7-9).

But the parties disagree on whether Minerals was the proper recipient of the citation.

MSHA's evidence reflects the following facts: MSHA Inspector Merrill Wolford issued the citation to Joe Jenkins, a supervisor of Union Oil Company (Tr. 9, 10). The parties in the scenario: Union Oil Company owns Minerals and Kaiser Engineering (Tr. 10). Hensel Phelps was a subcontractor for Kaiser Engineering (Tr. 10).

Inspector Wolford is not sure how Minerals fits into the picture but Minerals filed an operator's application with MSHA and received an identification number (Tr. 17). A large sign at the gate of the worksite states "Union 76, Minerals Exploration Company". The sign also contains the MSHA identification number (Tr. 17).

Inspector Wolford testified that when on an inspection of the premises they would go through a gap in the chain link fence to go from the Minerals mine area to where Kaiser and Hensel Phelps were located in the mill construction area (Tr. 12, 13, 37).

Wolford had been coming to the worksite on several prior occasions for a year. Jenkins exercised authority over subcontractors in handling and abating citations written by Wolford (Tr. 12, 38, 39). On one occasion an electrical contractor refused to abate a violative condition. After a confrontation between the subcontractor and Kaiser

1/ The standard allegedly violated provides:

55.4-24 Mandatory. Fire extinguishers and fire suppression devices shall be:

(b) Adequate in number and size for the particular fire hazard involved.

Engineering Jenkins ordered the abatement. The subcontractor abated (Tr. 39).

Project Manager Dykers and General Maintenance foreman Jacobson testified for Minerals. The evidence reflects the following facts:

In April 1980 Minerals was the wholly owned subsidiary of Union Oil Company (Tr. 18, 19). This combination owned the property and had a controlling interest in the ore (Tr. 19-20).

At the time the citation was issued construction was underway at the site. It included a plant, a shop, a mill and related facilities (Tr. 19-20). The mill was being erected by Kaiser Engineering, a wholly independent contractor (Tr. 20).

Joe Jenkins was assigned by Union Oil Company to insure that Kaiser met the design criteria and material specifications of their contract (Tr. 20, 21).

At the time of the inspection the contractor (Kaiser) had essentially completed the maintenance shop and the administration building. A fence separated construction activities from the mining activities (Tr. 21).

Dykers, Minerals' project manager, had no control over construction at the site (Tr. 22). Nor did Minerals have any control over Hensel Phelps, except through Union's corporate management (Tr. 22). In fact, Minerals protocol and procedure prohibited Dykers from dealing directly with Kaiser Engineering or Hensel Phelps (Tr. 22).

Minerals seven safety representatives had nothing to do with the construction at the job site (Tr. 23). Minerals had no operating authority, could not issue orders, and could not discuss any item of business with construction personnel (Tr. 23, 24). If Minerals' safety department found a significant item they would bring it to Dykers. He would pass it through corporate channels (Tr. 24). The purpose of the independent atmosphere was to insure there would be no division of authority or cross purposes (Tr. 24).

Several written Union memoranda issued before and after the inspection confirm Dykers' testimony concerning the separation of the construction activity from the mining activities (Exhibit MEC 1, 2, 3, 4).

Discussion

Minerals' post trial brief relies on Phillips Uranium Corporation, 4 FMSHRC 549 (1982). Minerals contends that the Secretary's issuance of the citation was solely for the Secretary's administrative convenience, a procedure condemned by the Commission in Phillips.

I am not persuaded by Minerals' arguments. The uncontroverted evidence cannot be ignored. This evidence follows: Inspector Wolford had been inspecting this worksite for approximately a year before the instant citation was issued (Tr. 12). On several prior occasions Jenkins, the resident engineer for Union, (parent of Minerals) exercised authority over the subcontractors and on several occasions he directed the abatement of Wolford's citations (Tr. 38, 39). Jenkins, according to Wolford, ordered the abatement of the instant citation. These activities constituted sufficient control over the worksite so as to render Union/Minerals the proper recipient of Citation 576874.

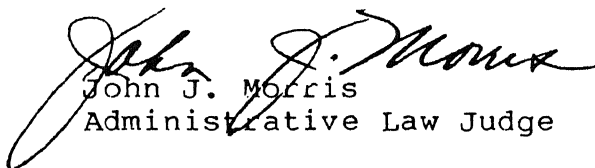
Further, even had the Secretary's enforcement policy predated this inspection, Minerals would not prevail. Control over abatement is one of the factors mentioned in the Secretary's enforcement policy for independent Contractors, 45 Fed. Reg. 44,497 (1981).^{2/} When inspector Wolford issued the citation he could reasonably believe, based on prior experience, that Minerals personnel were taking charge of abatement and that they had some supervision over independent contractors complying with safety rules. Further, the violation occurred on Minerals' property and the only mine identification number available to the inspector for the property was the one upon which the citation issued.

Since it is uncontroverted that the violative condition existed it follows that the citation should be affirmed. In sum, the independent contractor defense outlined in Phillips is not available to contestant.

For the foregoing reasons I enter the following:

ORDER

The notice of contest filed herein is dismissed.


John J. Morris
Administrative Law Judge

^{2/} The guidelines which accompany adoption of the independent contractor regulations, now codified at 30 C.F.R. § 45 provide, in pertinent part, as follows:

Accordingly, as a general rule, a production operator may be properly cited for a violation involving an independent contractor: ... (4) when the production operator has control over the condition that needs abatement.

/blc

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

FEB 14 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 81-79-M
Petitioner	:	A. C. No. 48-01181-05026
v.	:	Docket No. WEST 81-81-M
	:	A. C. No. 48-01181-05025 V
MINERALS EXPLORATION COMPANY,	:	(Consolidated)
Respondent	:	
	:	Sweetwater Uranium Project

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U. S. Department of Labor, Denver, Colorado,
for Petitioner;
Anthony D. Weber, Esq., Union Oil Company of
California, Los Angeles, California,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Minerals Exploration Company, with violating safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits began on October 5, 1982 in Laramie, Wyoming.

Respondent filed a post trial brief.

Issues

The issues are whether Respondent violated the various safety regulations and, if so, what penalties are appropriate.

Jurisdiction

Respondent admits jurisdiction (Tr. 230).

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.9-40(c). 1/

Summary of the Evidence

During a lunch break MSHA Inspector Merrill Wolford observed two people in a front end loader. The door of the loader was open and one person was partly outside of the cab (Tr. 368-372). At the time the loader was spreading gravel in a congested area next to the main entrance of the administration building (Tr. 371, 372, Exhibit P6).

In the ensuing investigation Jerry Carpenter, a trainee supervisor, told the inspector that he had been instructing Stanley E. White, a new employee, in the operation of the vehicle (Tr. 371).

A photograph taken by the inspector and the testimony of Carpenter and White confirm Inspector Wolford's testimony. (Tr. 372, 379-383, 384-388, Exhibit P-5).

The cab of this particular loader, equipped with one seat belt, is constructed for one person (Tr. 372). In the inspector's opinion an inexperienced driver could have caused the other person on the vehicle to fall and be crushed under the wheels (Tr. 373). Alternative methods of training an employee would have been for the instructor to secure himself in the vehicle. In addition, any training should have been in a less congested area (Tr. 373).

Discussion

Respondent waived any post trial argument in respect to the citation (Brief, page 13). Since the uncontroverted evidence establishes a violation of Section 55.9-40(c) the citation should be affirmed. Cf. Heldenfels Brothers, Inc., 2 FMSHRC 3173, 3174 (1980).

Citation 576953

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.4-12.

At the hearing the parties sought to settle this citation by

1/ 55.9-40 Mandatory. Men shall not be transported:
(c) Outside the cabs and beds of mobile equipment,
except trains.

reducing the proposed penalty to \$65 from \$130. The parties further sought to drop the designation that the violation was significant and substantial (Tr. 229, 230, Order, October 25, 1983).

In support of his motion petitioner stated that in the original assessment the gravity had been overstated (Tr. 229, 230).

For good cause shown the proposed settlement was approved and is formalized in this decision.

Citation 576954

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.16-5. ^{2/}

Summary of the Evidence

MSHA inspector Merrill Wolford wrote this citation when he observed that respondent's oxygen and acetylene compressed gas cylinders (bottles) had their regulators attached while the cylinders were being transported. The clamp holding the cylinders was loose (Tr. 232, 241-242). Photographs of respondent's welding truck 2902 were received in evidence (Exhibits P2, P3).

The inspector found that the bolt holding the clamp could be rotated, whereas the bolt should have been tight enough to hold the clamp (Tr. 234, Exhibits P2, P3). The hazard here arises in this fashion: In the event of an accident the bolt could knock the regulator valves off of the cylinders. This would create a bomb (Tr. 234-235).

Abatement was achieved by tightening the clamp so the cylinders could not move (Tr. 242). In addition, the regulators should have been removed and the gas cylinders capped (Tr. 243). Two types of caps are available commercially for this purpose (Tr. 244, 245).

The inspector felt the violation here was of a significant and substantial nature because it could lead to an accident involving serious injury or death (Tr. 245).

^{2/} 55.16-5 Mandatory. Compressed and liquid gas cylinders shall be secured in a safe manner.

Bobby Jacobsen, Jerome Connor, and Jerry McDermott testified for the respondent:

In April 1980, at Inspector Wolford's suggestion, respondent turned the cylinders in the truck, installed two vent holes, and mounted doors to hold the cylinders (Tr. 254, Exhibits R1, R2). The inspector indicated that with this arrangement, with a steel bar further securing the doors on the truck, the cylinders could be transported with their gauges on them as long as the cylinders were turned off and the hoses were purged of gas (Tr. 255). After the changes were made the truck operated in this mode until the instant inspection (Tr. 255).

Due to its frequent use it is necessary to transport this equipment in a truck (Tr. 256). Respondent's maintenance foreman didn't feel there was any hazard because the cylinders had been shut off (Tr. 258).

It is 12 to 14 inches from the top of the cylinders to the top of the compartment holding the cylinders (Tr. 259).

While checking the equipment Inspector Wolford tried, but could not, turn the nut holding the bracket. Witness Connor applied a wrench and the nut turned one quarter to one half of a turn (Tr. 262, 265, 272).

The bracket holding the cylinders is located at the midsection of the cylinders (Tr. 262-263). The angle iron bracket that fits the cylinders is cut in a horseshoe shape (Tr. 264, Exhibit R2). When changing the heavy gas cylinders the company welder, McDermott, completely removes the bracket (Tr. 266, 267). The bottom of the cylinders are held in place by brackets welded to the floor of the truck. These three to four inch brackets are curved to fit the bottom of the cylinders and to prevent their movement (Tr. 266). Before the gas cylinders will go into the well which holds them they must be vertical. The bottom forms a tight fit (Tr. 266, 267).

Discussion

At the hearing the Secretary sought to amend his citation by alleging a violation of Section 55.16-6 ³/ in lieu of Section

³/ 55.16-6 Mandatory. Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

55.16-5 (Tr. 235-240). The motion to amend was denied as being untimely (Tr. 240-241). The Secretary's counsel stated that in any event his evidence would establish a violation of both sections (Tr. 237).

As a threshold matter respondent asserts that the Secretary is estopped to maintain that any hazard existed. This position evolves from the uncontroverted evidence that Inspector Wolford was responsible for the design of the cabinet and clamp that secured the cylinders (Brief, page 12).

Respondent's contention is rejected. The doctrine of estoppel is generally not applicable against the federal government. King Knob Coal Company, 3 FMSHRC 1417 (1981); Burgess Mining and Construction Corporation, 3 FMSHRC 296 (1981).

The doctrine of estoppel does not apply but on the merits of the case I find no violation of Section 55.16-5.

The uncontroverted testimony and photographs Pl, P2, and R1 clearly show that the cylinders were secured by the manner in which they fit into the truck. They must be vertically straight to go into a slot which then forms a tight fit. The clamp at mid-point further secures the cylinders.

A sharp conflict exists in the evidence as to whether the bolt holding the clamp was loose (In Exhibit P3 the clamp is marked). On this issue I credit the testimony of respondent's witnesses Connor and McDermott. They indicated the nut could only be tightened about a quarter of a turn after pressure was applied with a wrench (Tr. 262, 272). The action by respondent's witness in tightening the nut is not controverted by the inspector.

Based on the foregoing facts I conclude that the compressed gas bottles were secured in a safe manner within the meaning of Section 55.16-5.

Accordingly, no violation occurred and Citation 576954 and all proposed penalties should be vacated.

Citation 336285

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.9-2. ⁴/

⁴/ 55.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

The allegations here concern: (A), a crack in the rim flange of a haul truck, (B), a bolt missing on an operator's cab, and (C), an air leak in a braking reservoir.

A.

Concerning the 120 ton Wabco haul truck rim flange:

MSHA Inspector Martin Kovick observed what he described as a radial crack in a rim flange. The crack was approximately 4 1/2 inches in length. (Tr. 275, 278). If the rim came off it would put additional weight on the other tire. Possible blow outs or a tipping of the truck could occur (Tr. 275).

At this mine cracks in the rim flanges of the trucks are fairly common. A radial crack, according to Inspector Kovick, is one that goes the same direction as the wheel itself. It is the same as a circumferential crack (Tr. 283, 284-285).

The inspector didn't measure the depth of the crack but he did measure its length. The inspector generally knew of several fatalities that have occurred due to rims flying apart (Tr. 286).

Bobby Jacobsen and Casey Conway testified for the respondent:

Witness Jacobsen, the maintenance general foreman, has worked with tires for 12 years. He was not present during the inspection of the haul truck but the vehicle was sent to the "down line" where he inspected it (Tr. 316, 317, 331).

The four to five inch crack in the flange was a circumferential crack, that is, following the outside line of the wheel (Tr. 323, 324). A radial crack is one going across the face, from top to bottom (Tr. 324). If a circumferential crack is not broken out along its edge it presents no safety problems. (Tr. 324). This 51 inch wheel has a four to five and one half inch wide flange (Tr. 325).

When circumferential cracks have occurred in the past it is respondent's policy to replace the flange when they break down the tire. The only danger in a circumferential crack might be to the tire (Tr. 325, 326, 342). Even if a circumferential crack exists there isn't any danger as long as the tire is inflated (Tr. 329). Jacobsen has never known a tire to loose pressure due to such a crack. If a radial crack occurs it will cause the tire to wear (Tr. 329-330). If a piece, or a part, of the flange breaks out of a radial crack then the tire will wear severely at that spot (Tr. 330).

If a flange had a radial crack Jacobsen would probably remove it from the truck as soon as possible. This would be particularly true if the defect was on a front tire (Tr. 331).

Respondent's practice of changing flanges depends on the size of the crack (Tr. 343, 344). Jacobsen agrees that a crack could conceivably, if allowed to develop, fail to provide structural support to the tire (Tr. 345).

When respondent's personnel evaluate a crack in a flange they look at its length and use a feeler gauge or knife to determine its depth (Tr. 350). The cracked flange observed by the inspector wasn't "that bad." It was about one sixteenth of an inch. Jacobsen would change this particular flange if it was about 16 inches in length and one quarter of an inch deep. Wabco trucks are quite susceptible to cracks in the flanges.

Casey Conway, respondent's safety supervisor, inquired of MOTOR WHEEL, a subsidiary of Goodyear Tire and Rubber Company concerning rim flanges (Exhibit R3). The company's correspondence indicated that rim flanges are in compression due to tire loads. Due to the compression no safety hazards exists from radial or circumferential cracks (Exhibit R4). The company further noted that a radially cracked flange should be removed and any cracked flange should be discarded when the tire is changed (Exhibit R4). The general reason for making the change is to prevent damage to the tire (Exhibit R4).

Discussion

The gravamen of any violation of Section 55.9-2 is whether an equipment defect exists and, if it does, whether the defect affects safety. Allied Chemical Corporation, 4 FMSHRC 506 (1982).

In the instant case an equipment defect existed because a rim flange would not ordinarily be cracked.

However, the Secretary's case fails on the issue of whether the flange crack affected safety. On this issue I credit respondent's expert testimony. Such expertise is considerably greater than the inspector's. In addition, the Secretary's case is lacking in particulars. Specifically there is no evidence of the depth of the flange crack. A mere crack is not shown to have affected the safety of this equipment.

For the foregoing reasons the initial portion of this citation, involving the cracked flange, should be vacated.

B.

Concerning the bolt missing on the operator's cab:

According to MSHA Inspector Kovick 4 to 6 bolts hold the cab to the frame of the vehicle. One of the bolts, on the upper portion, was missing. The inspector felt that a hazard would occur if the other bolts became loose or broken. The inspector didn't check to see if the cab was welded to the frame (Tr. 280).

Jacobson and Conway testified for the respondent:

Jacobsen is familiar with Wabco trucks. The bolt referred to by the inspector attaches the cowling which is the sheet metal in front of the truck. It does not attach to any part of the cab (Tr. 318-320).

The cab is welded to the deck which is, in turn, bolted to a 3 x 3 tubular pipe which is bolted to the frame (Tr. 318). When Jacobsen looked at the truck the bolt had been replaced (Tr. 317). A mechanic had put a nut onto the bolt to tighten down the cowling (Tr. 321).

In discussing the citation Jacobsen told Kovick that he couldn't believe what they were talking about (Tr. 318-319). Kovick did not reply (Tr. 319).

In rebuttal Inspector Kovick recalled that the bolt was in the back but he didn't remember the side where it was located (Tr. 354).

Inspector Wolford indicated that respondent previously welded the cabs to the frame because of problems caused when the main strut supports break through the bolt holes (Tr. 355, 356). Probably all of respondent's haul trucks have struts welded to the frame (Tr. 356).

Discussion

The Secretary's case fails for several reasons. The evidence is unconvincing that this single missing bolt in any manner affected the safety of the cab. Inspector Kovick testified that if other bolts were to become loose or broken a hazard could result (Tr. 276). The section in contest, 59.9-2, requires more than the mere possibility that the equipment defect might affect safety in the future.

I further credit respondent's evidence as to the function of this bolt. A person charged with the obligation of maintaining these vehicles would know whether the bolt connected to the frame or the cowling.

For these reasons the second portion of the citation, relating to the missing bolt, should be vacated.

C.

Concerning the air leak:

Inspector Kovick indicated an air leak existed in the reservoir tank located behind the compressor. In his view the air leak could contribute to a braking hazard (Tr. 275, 276, 281). This condition should be corrected particularly because of the weight of the haul trucks (Tr. 276). The witness indicated this air reservoir involved the emergency braking system and the leak was in one of the lines that connected to the tank (Tr. 281). During the inspection a person could hear the leak even though the motor was running (Tr. 287).

Respondent's evidence:

Foreman Jacobsen heard the air escaping when he walked around the back of the truck on the right hand side (Tr. 319). Jacobsen told his mechanic to check the pop off valve on the air tank. He further instructed him to set the air governor at 155 pounds (Tr. 321). They found the air governor was not functioning properly so Jacobsen told the mechanic to change it (Tr. 321).

The reservoir is a storage compartment for air. The governor controls the air compressor pump (Tr. 322). If you do not set the air governor the compressor is going to continue to pump. This was an air leak at the pop off valve. The compressor was pumping air into the reservoir at 170 psi and the pop off valve was unloading. The air governor was replaced (Tr. 323).

After being replaced the air governor shut off at the desired setting. The pop off had occurred because the governor wasn't adjusted properly. The leakage was at the top of the air tank (Tr. 332).

The pop off valve is a relief valve for the air compressor system. The valve presents no hazard but, to the contrary, it promotes safety. The pop off valve emitted a sound similar to leaking air (Tr. 349).

Discussion

I credit the expertise of respondent's witness Jacobsen. He identified the leaking air sound as the pop off valve. He further corrected the situation which did not in any event affect safety.

Since safety was in no way affected by the condition of the pop off valve the third portion of the citation should be vacated.

Citation 576958

This citation asserts there were 48 missing bolts on respondent's fuel truck which affected its safety. Accordingly, the Secretary claims respondent thereby violated 30 C.F.R. Section 55.9-2, cited in footnote 4.

Summary of the Evidence

MSHA Inspector Merrill Wolford checked respondent's fuel truck No. 2901. On the bottom side he found that all 48 bolts that secure the dispensing units to the truck were loose. The bolts attach the dispensing units and they are connected to angle iron flanges. Some bolts formed egg shaped holes and some had pulled through the plate (Tr. 492-494, Exhibit P11). The bolts are one and to two inches long and the inspector could see a gap under a lot of them. In some cases the gap was as much as a half inch. Five or seven bolts were missing and there were no washers on the bottom side (Tr. 500, 501).

The units attached to the truck bed contain diesel, fuel, hydraulic oil as well as antifreeze (Tr. 494). The inspector felt that in the event of a sudden stop or accident the fuel tanks could shear off and crush the cab (Tr. 494).

On February 6, 1980, in a previous inspection, Inspector Wolford issued a withdrawal order on this vehicle. One of the conditions he found at that time were loose bolts holding the dispensing tanks (Tr. 495).

Respondent's evidence:

Casey Conway was under the truck when Inspector Wolford made his observations. He asserts the inspector merely tested four to eight bolts and not all 48 (Tr. 506-508). A diagram prepared by respondent's draftsman shows exactly 40 one half inch nut and bolt connections (Tr. 503, Exhibit R10).

Conway counted the bolts a year after the inspection. In addition he didn't know when the diesel dispenser and generator had been welded to the bed of the truck (Tr. 506-507, 509).

Jamieson, the lub truck driver, tightened the loose nuts that secured the units. On the left side a dozen were extremely loose and others were snug up to the lock washer. Jamieson torqued these down anyway (Tr. 510-513).

While some bolts were very loose others required a quarter of a turn, and some no turn at all. Jamieson considered that a bolt was tight even if he tightened it down a quarter of a turn (Tr. 515).

Discussion

I find MSHA's witness Welford credible. When he was under the truck he observed the loose bolts.

While respondent's witness Conway was under the vehicle with Welford at the time of the original inspection, he concedes he did not count the bolts until a year after the inspection.

Respondent's evidence also includes a mechanical drawing. It was no doubt offered to show that there were only 40 one half inch bolts under the truck bed as per the drawing. Therefore, with such evidence, respondent should prevail on this credibility issue.

I put no credence in the drawing. The record fails to reflect when it was prepared. The drawing shows that three different dispensing units were welded to the truck but Conway didn't know when they had been welded. Without such pivotal evidence I give zero weight to the drawing.

Further, I give zero weight to Jamieson's testimony: Jamieson considers a tight bolt to be one that will take a quarter of a turn (Tr. 515).

Respondent's post trial brief strenuously argues that Welford's testimony is incredible when contrasted with Conway's testimony and the drawing. On the contrary, I credit Welford's testimony which clearly shows that "there were 48 bolts I counted loose and there are other bolts on the truck. There is a compressor and dispensing hose rack on the truck and there are other pieces of equipment mounted on that truck" (Tr. 496-497).

On this basis I conclude there were more than 48 bolts under the truck at the time of the accident. Such a direct count of "48 and more" causes me to reject respondent's contrary evidence.

For the foregoing reasons citation 576958 should be affirmed.

The citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.5-3. ^{5/}

Summary of the Evidence

MSHA Inspector Merrill Wolford observed dust or sand rising from the tail of the drill stem when he was 300 to 400 yards away. Rocky Anaya, upon observing the inspection party, went around and turned the water on at the tank (Tr. 517-521). When the water was turned on the dust emissions came under control (Tr. 530).

When the inspection party reached the scene the dirt coming out of the drill hole was damp, but the inspector saw no water in the hole. The water tank was full, although drillers Anaya and Stressler stated they had drilled four holes to a depth of 45 feet. The holes had a 9 inch diameter (Tr. 517, 518, 521, 522).

Anaya and Stressler said other inspectors and supervisors had told them to drill wet only if they were in rocky ground (Tr. 518, 519). Neither men were wearing respirators. But there were 3M respirators in the cab of their vehicle (Tr. 517-518).

The hazard here is mainly respiratory. Mononucleosis can result. The long time effect is life threatening (Tr. 519).

Joe Drake, Jerry Carpenter and Rocky Anaya testified for respondent:

Drake, the drilling and blasting foreman had instructed the workers to use water anytime dust is encountered. Sometimes they strike water. In that event there is no need for water as a dust control measure (Tr. 527-529). The criteria is not whether the ground being drilled is wet or dry but whether the drilling produces dust (Tr. 528).

Rocky Anaya turned on the water when he saw the inspection team approaching. He thought he might be cited for not having the water turned on. He was then drilling in wet sandy material and he didn't need water. When the inspector arrived wet sandy material was coming out of the drill hole (Tr. 524-526).

^{5/} 55.5-3 Mandatory. Holes shall be collared and drilled wet, or other efficient dust control measures shall be used when drilling nonwater-soluble material. Efficient dust control measures shall be used when drilling water-soluble materials.

Discussion

I find the inspector's testimony to be credible. He observed dust, or sand, at the drill stem. He approached and saw that the material then coming out was damp. The rest of the offal was dry.

If Anaya was drilling in wet sandy material there was no necessity for him to turn on the water when he saw the inspection team. He was already following respondent's instructions. I accordingly reject respondent's factual defense.

Respondent's post trial brief asserts that the testimony of Inspector Wolford is not credible. This argument arises in Wolford's testimony that he didn't know whether he was observing dust or sand. Further, he didn't know the materials in which Minerals was drilling (Tr. 521). In short, respondent asserts that Anaya's testimony is unrefuted that the material was sandy and wet. Therefore, no violation existed.

I disagree. When questioned on this point Inspector Wolford stated that when he looked at the offal around the edge of the hole "the last little bit right at the top where they had just finished the hole was damp, but the rest of it was dry" (Tr. 523). Whether the materials were soluble in water or not is not relevant in this factual setting. Under either circumstance respondent was not using any dust control measure whatsoever. It was therefore in violation of the regulation.

For these reasons Citation 576959 should be affirmed.

Citation 576960

This citation alleges that two bolts were missing from the anchor plate of respondent's 9H Cat in violation of 30 C.F.R. 55.9-2.

At the hearing respondent withdrew its notice of contest stating that the proposed penalty had been paid (Tr. 391, 392; Order, October 27, 1983).

Pursuant to Commission Rule 29 C.F.R. § 2700.11, the motion was granted and it is formalized in this decision.

Citation 577061

This citation asserts respondent's 65 ton water truck had three defects. These were defective brakes which caused the truck to pull, a wobbling tire, and a separation of a tread from a tire.

In addition, it is alleged that the tire with the separation had been removed from service but not tagged out.

A.

The initial allegation concerns the brakes which caused the truck to pull to the right. This defect violated 30 C.F.R. Section 55.9-3. ^{6/}

Summary of the Evidence

MSHA Inspector Merrill Wolford observed respondent's water truck No. 2901 pulling very hard to the right (Tr. 447, 452). The driver could not prevent such movement. The pulling caused by the brakes is a severe hazard (Tr. 452, 453).

Bobby Jacobsen, respondent's foreman, indicated the front brakes on the truck had been relined two weeks before the inspection (Tr. 456). Different linings had been installed (Tr. 456).

Discussion

Inspector Wolford's testimony is uncontroverted: The water truck's brakes caused the vehicle to pull very hard to the right. Respondent's evidence confirms the defective condition. Respondent's was concerned that the truck might pull so they placed a notice on the dash directing drivers not to operate the vehicle in excess of 10 miles per hour (Tr. 457; Brief, page 19).

The evidence clearly establishes that the brakes on the truck were not adequate. This establishes a violation of Section 55.9-3.

For the above reasons the initial portion of Citation 577061 should be affirmed.

B.

This portion of the citation asserts that the left front wheel of the truck was wobbling. This condition violated 30 C.F.R. Section 55.9-2, cited in footnote 4.

^{6/} 55.9-3 Mandatory. Powered mobile equipment shall be provided with adequate brakes.

Summary of the Evidence

MSHA Inspector Welford observed that the left front tire of the truck was wobbling "very badly." He first observed this condition when he was 300 to 400 yards away. Upon inspecting it first hand he found a lot of play in the steering mechanism; further the ball joints were worn (Tr. 447, 448, 452). In the inspector's opinion the wobbling was caused by worn out steering (Tr. 452).

The wobbling tire was a severe hazard that could cause a loss of control (Tr. 453).

Respondent's evidence:

Bobby Jacobsen recognized that the company had experienced some problem with the shimmy of the truck (Tr. 455, 457). According to Jacobsen wobbling is the same as shimmying. It was a three to four inch shimmy (Tr. 458, 459).

A corn nut used to adjust the steering valve would occasionally back out (Tr. 457). Excessive pressure into the steering valve would cause the wheel to shimmy (Tr. 457, 458).

After the inspection Casey Conway inspected the steering arm and its configuration. There was nothing found by the visual inspection but later they learned there was a left hand steering cylinder problem (Tr. 472, 473). Too much pressure in the cylinder can cause a shimmy (Tr. 473).

While Conway saw the vehicle, shimmying as described, the vehicle did not demonstrate any lack of control (Tr. 473-474). There was nothing found in the steering area having to do with the ball joints (Tr. 473-474).

Discussion

The inspector's testimony establishes the violation. Respondent's evidence confirms it.

The second portion of Citation 577061 should be affirmed.

C.

The third allegation focuses on the allegation that the outside tire of the dual tires on the truck had a 15 inch separation, was split, and was bulging. The citation then cites 30 C.F.R. 55.9-2, which is cited in footnote 4. In addition, the citation further alleges that the safety department had taken the

truck out of service. Yet it is alleged the truck was being operated and it had not been tagged out, citing 30 C.F.R. 55.9-73. 7/

Summary of the Evidence

Inspector Merrill Wolford observed that the tread on the rear dual 2700 x 35 recap tire was separated and bulging (Tr. 447, 448, 451, Exhibits P7-P10). The tread was separated from the tire carcass for 15 inches on one side. The separation went through toward the other side (Tr. 449). By pushing on the tire he could feel a difference between the separation and the rest of the tire (Tr. 450). When the truck moved the tire flexed from side to side and bulged to the outside (Tr. 450). A possible blowout, with resulting loss of control, could occur on this terrain which was mostly dirt and rough ground (Tr. 450-451).

Respondent's evidence:

Robert Jones, Kenneth Davis, Bobby Jacobsen, and Casey Conway testified. Robert Jones, a person with 16 years experience in servicing, managing and selling tires, was familiar with the tires on a Wabco 65 ton truck (Tr. 392, 393). His primary business is tire maintenance and he is familiar with separations that occur on the General Tire Company tires used on the Wabco 65 ton water truck (Tr. 397, 398, 433, Exhibit R9).

The carcass, which contains nylon, is the main body of the tire. On the outside of the carcass are bead breakers. The face of the tire, that is, the whole tread area, are above the bead breakers (Tr. 400, 410, Exhibit R9)

In the operation of the truck heat will cause the nylon cord to stretch. When this occurs the rubber tread fails to stretch with it. A cracking or separation results (Tr. 400, 401).

The same carrying capacity exists and no hazard is involved at lower speeds. But a hazard could exist with a tread separation if the vehicle was on a five to ten mile trip and running in excess of 30 or 35 miles per hour (Tr. 401-402). A hazard begins

7/ 55.9-73 Mandatory. Defective equipment, removed from service as unsafe to operate, shall be tagged to prohibit further use until repairs are completed.

when the tire loses part of the rubber and starts to wear through the cord body (Tr. 402).

The carcass of the tire holds all the pressure and all the weight of the tire (Tr. 405). There is no greater risk as long as the cord body is intact (Tr. 410, 434). "Bird nesting" is where the rubber comes apart from the ply which then starts to wear (Tr. 413).

The tread of this tire is 18 to 20 inches. The outside circumference of the tire is 20 feet.

The bulging in the tire is a result of the rubber coming away from the cord ply (Tr. 438). If there is cord damage the bulge would be more severe. Further, "bird nesting" will occur because the ends will start to curl up (Tr. 441).

Kenneth Davis, respondent's mine superintendent, probed the separation on this recap with a screw driver. He was only able to insert the screwdriver three to four inches into the separation until it hit rubber (Tr. 477, 488, 490). The separation was 10 to 12 inches from the shoulder of the tire (Tr. 482).

The water truck wasn't carrying its designated weight. It was originally a 65 ton rock truck with a carrying capacity of 215,000 pounds. Refitted as a water truck it weighs 150,000 pounds when loaded (Tr. 485).

In March 1981 respondent arranged a meeting with representatives from General Tire Company and Redburn Tire Company. The meeting was for Wolford's benefit to discuss tire separations (Tr. 486, 487).

Bobby Jacobsen confirmed that if the cord of the tire is not breaking down no hazard results from continuing to use a tire with a separation of this type (Tr. 461-462).

Casey Conway accompanied the inspection team and they inspected the water truck about 9:30 a.m. The truck was taken to the tire shop and parked. No citation was written until there was a later inspection that day (Tr. 469-470).

At 4:30 p.m. that day the truck was driven past Wolford and Conway. Wolford stated "he thought we had shut it down" (Tr. 471). Wolford looked like he was getting angry because respondent was operating the vehicle without changing the tire (Tr. 453, 454, 471, 472).

Acosta and Wolford discussed whether the tire should have been removed from service. There was no question about the hazard. (Tr. 475). Wolford referred to the fact that the company

had agreed to move the dual from the outside to the inside. To avoid a confrontation the company decided to change the tire from the outside to the inside (Tr. 475).

Discussion

As already noted, the gravamen of this portion of the citation is whether the tire was unsafe.

On this credibility issue I find in favor of respondent's evidence. At the outset I note that Inspector Wolford demonstrated no particular expertise concerning tires. On the other hand respondent's witness Robert Jones has considerable experience in this area of expertise. At the hearing respondent, for illustrative purposes, presented a tire similar to the Wabco truck tire. The testimony of the witnesses, as outlined in the factual statement, causes me to conclude that the recap tire here, with its 15 inch tread separation, was not unsafe.

The third portion of the citation further states that "the truck had been observed with the bad tire and the safety department had taken it out of service to have the tire rotated inside. Yet, this truck was being operated on the evening shift and the operator stated it had not been tagged out, mandatory standard 55.9-73."

Since I find that the tire was not defective in such a manner as to affect safety I conclude that this portion of the citation should be vacated as to the alleged violation of Section 55.9-73.

For these reasons the third portion of Citation 577061 should be vacated.

Civil Penalties

The citations, their disposition, and the remaining proposed penalties are as follows:

<u>Citation No.</u>	<u>Disposition</u>	<u>Proposed Penalty</u>
576949	Affirm	\$ 255
576953	Settled, reduced to	65
576954	Vacate	-
336285	Vacate	-
576958	Affirm	122
576959	Affirm	295
576960	Contest Withdrawn	195
577061A	Affirm	725
577061B	Affirm	725
577061C	Vacate	-

The mandate to assess civil penalties is contained in Section 110(i), [now 30 U.S.C. 820(i)], of the Act. It provides:

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Concerning the operator's history of prior violations: Respondent was assessed a total of 154 violations between August 8, 1978 and August 18, 1980 (Exhibit P1).

Concerning the appropriateness of the penalty to the size of the business of the operator charged: the parties stipulated that the size of the operator is contained in the notice of assessment in each case. In WEST 81-79-M the size of respondent's mine is noted to be 273,078 man hours per year (Tr. 3, 230, Notice of Assessments).

Concerning the negligence of the operator: With the exception of the lack of bolts to the underside of the truck carrying the fuel units all of the situations presented open and obvious conditions. The condition of the bolts holding the dispensing units could easily have been ascertained during routine maintenance.

Concerning the effect of the penalty on the operator's ability to continue in business: The parties stipulated that proposed penalties will not affect the business of the operator (Tr. 3).

Concerning the gravity of the violation: Severe injuries could have been caused by any of the violative conditions. I consider the gravity to be severe in each instance where the violation is affirmed.

In connection with Citation 577061 A and B respondent's post-trial brief asserts that the proposed penalty is excessive because the company posted a notice instructing its drivers not to operate the vehicle over 10 miles per hour. True, the notice was posted. But a swerving truck and wobbling tire are severe hazards at any

speed. Further, posting a notice is a totally unacceptable method of abating such defects.

Concerning the good faith of the operator in abating the violative conditions: To the operator's credit it rapidly abated the violative condition.

Considering all of the statutory criteria and the relevant facts I conclude that the proposed penalties, as outlined above, should be affirmed.

WEST 81-81-M
Citation 337741

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.4-12. ^{8/}

Summary of the Evidence

When inspecting respondent's lube shop Inspector Merrill Wolford found large pools of oil, diesel fuel, grease, and rags practically everywhere. This condition was throughout the service bays, the pump rooms, the office and the lunch area (Tr. 540-544, Exhibits P2-P13).

A commercial absorbent, referred to as floordry, had been applied on parts of the floor. In some areas the accumulations were one eighth to one quarter of an inch thick (Tr. 560, P-2, P-8).

The inspector was concerned about a serious fire hazard as the accumulations and various materials were flammable and combustible (Tr. 541). Ignition sources included electrical motors as well as the various vehicles being serviced in the shop. Inspector Wolford ordered all six workers withdrawn. However, he permitted those in the clean-up crew to remain (Tr. 541, 556). Except for the overhead lights he ordered all electrical power turned off (Tr. 541, 544).

If a fire occurred a fatality could occur or the workers could be burned (Tr. 544).

In the previous week the inspector had issued a citation for the violation of the same standard in the same area of the lube shop (Tr. 544, 545, Exhibit P-14). The violative conditions were readily observable (Tr. 546). The earlier citation was abated in

^{8/} Mandatory. All flammable and combustible waste materials, grease, lubricants or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

three hours. The instant citation was abated in nine to ten hours (Tr. 548).

The accumulations occurred in the shift before the inspection (Tr. 548, 549). The oil and grease will fall to the floor during the servicing of equipment (Tr. 547-548).

Respondent's superintendent Martin told the inspector that it is customary to clean the shop every day but due to some problem the lube area hadn't been cleaned the day before (Tr. 550).

Casey Conway, Gary Denault, Jerome Connor and Bobby Jacobsen testified for respondent:

Witness Conway testified as to the flash and ignition points of the various lubricants used in the lube bay (Tr. 568, 569). The NFPA (National Fire Protection Association) defines a flash point as a point at which a liquid contained in a closed container, when heated, emits suitable vapors so that when a flame is introduced the vapors will burn (Tr. 570, 571). Ignition temperature, also measured in a closed container, is that temperature of the vapors into which you introduce an ignition source and the vapors will thereafter burn independently of the ignition source (Tr. 571).

Respondent's materials have the following flash and ignition points:

<u>Material</u>	<u>Flash Point</u>	<u>Ignition Point</u>
Ethylene glycol (antifreeze)	232°F	752°F
SAE Oil, 10 weight	410°F	
SAE Oil, 30 weight	451°F	
SAE Oil, 40 weight	464°F	
SAE Combination Oil	410°F to 451°F	
C3 Hydraulic Oil	464°F	
Hydraulic Fluids	over 464°	
Gasoline	around 45°C	

(Tr. 568-575, 588).

The doors in the lube bay, unlike a closed container, are 25 to 30 feet wide and 40 to 45 feet high (Tr. 575). In an open environment, and with proper ventilation, vapors will tend to dissipate thereby lessening a fire hazard (Tr. 581). Materials with high flash points will not tend to have vapors that will accumulate with proper ventilation (Tr. 580).

A flammable material has a flash point of 100 degrees (F), or less, at 40 psi. A combustible material has a flash point greater than 100°(F) at 40 pounds psi. A flammable material has a greater

burning potential than material that is merely combustible (Tr. 583, 584).

The term flammable is used to describe a combustible material that ignites easily, burns intensely, or has a rapid rate of flame spread (Tr. 586). Paper and oil soaked rags are combustible (Tr. 587). A cigarette or plain paper would smolder and turn into a flame (Tr. 588).

Gary Denault, a mechanic in the lube bay on the day of the inspection, indicated the lube bay got "messed up" as it normally does during a rush day. There was a "mess" in the pump room (Tr. 592-593). Denault had spent all day working on the 2301 loader. About ten minutes before the end of his shift the oil filter sprang a leak and dumped approximately five gallons of 15/40 oil on the floor (Tr. 593-594). Denault threw down some floordry and trapped the pool of oil. He then sought his supervisor to see if he should remain and clean it up. The supervisor had already left (Tr. 595, 596).

Denault might have had some smaller spills from earlier trucks. The practice was to clean up any accumulations at the end of the shift (Tr. 599).

William Jamieson, who worked the swing shift, entered the lube bay and saw oil on the unswept floor, cardboard boxes, and full trash receptacles. These conditions had been caused by the day shift (Tr. 603, 604, 606, 607). Johnson went to the safety office to report the condition. The inspector arrived at the lube bay shortly thereafter (Tr. 604, 605).

Normally the cleanliness of the lube area would range from clean to slightly dirty or messy. It's condition would depend on what had transpired on the prior shift (Tr. 604).

Jerome Connor, respondent's safety superintendent, wasn't aware of the condition in the lube until Jamieson reported it to him and the MSHA inspectors (Tr. 609, 611).

As a result of the citation in the previous week strict attention had been paid to the area (Tr. 610).

Bobby Jacobsen, respondent's general maintenance foreman, indicated the seven foot high neon lights were spark resistant (Tr. 613, 614).

The tanks for the various lubricants are underground. Electrical equipment in the lube bay includes the steam cleaner and air compressor. The electric motor is mounted with the steam cleaner in a separate room in the lube bay (Tr. 615, 616).

Respondent, in its post trial brief, initially contends that the spillage and debris was within the "range of risks" for which the facility was designed.

I disagree. No facility is designed to be operated within a "range of risks". The evidence from MSHA witness Wolford was that he had never seen anything this bad before; he further described in detail the accumulations of oil and grease. I agree that it is not anticipated that a lube bay will be a model of cleanliness but conversely it is not anticipated, and the regulation prohibits, an unsafe accumulation as established by the oral testimony and confirmed by the photographs. In short, this facility was beyond its range of proper usage.

Witness Denault said "there was a mess in the pump room" (Tr. 592-593). Witness Johnson was so upset he went to the company safety officer to report the condition (Tr. 604). Further confirming the extent of the accumulations, it is uncontroverted that it required eight to nine hours to clean the lube bay. In contrast, on the prior citation a week earlier, the cleaning was done in three hours.

Respondent's evidence relating to the flammability and combustibility of its oils and lubes, as rated by their flash and ignition points fails to establish a defense. The Commission is bound to follow the definitions in Title 30, Code of Federal Regulations, Section 55.2. These definitions follow:

"Combustible" means capable of being ignited and consumed by fire. "Flammable" means capable of being easily ignited and of burning rapidly.

These definitions easily encompass the factual situation presented in the lube shop.

The Secretary proved a violation of the standard. He is not required to prove a risk related to the design and construction of the lube shop. Respondent's contention to that effect is without merit.

Respondent finally asserts that it exercised utmost good faith in the situation. It cites the testimony of Denault in containing the five gallon spill, the testimony of Jamieson in reporting the condition, and Connor's testimony that he lacked prior knowledge.

I am not persuaded. True, Denault contained the five gallon oil spill. But what of the rest of the accumulations. From the photographs it is apparent the accumulations had not all been a sudden occurrence. Jamieson did report the condition but supervisors are in and out of the lube bay during the day.

Connors' lack of prior knowledge fails to establish a defense. His testimony that the crews "had been fastidious in keeping it clean" (Tr. 609, 610) runs counter to the facts observed by those persons who were in the lube shop.

For these reasons Citation 337741 should be affirmed.

Civil Penalty

As previously noted the statutory criteria for assessing civil penalties are set forth in 30 U.S.C. § 820(a). The operator's prior history indicates it was assessed 59 violations in the two years beginning April 29, 1978 (Exhibit P1). The parties stipulated that the size of the operator's mine was 273,078 man hours per year (Tr. 3, 230, Notice of Assessments). The operator was negligent since the grease and oil accumulations were obvious and should have been seen by supervisors. In addition the operator should have been particularly attentive to this problem as the lube bay since it had been cited in the previous week for the same condition. The parties stipulated that the proposed penalty will not adversely affect respondent's ability to continue in business (Tr. 3).

The gravity of the violation is severe. A misplaced smoldering cigarette could cause a fire with the possibility of severe consequences. Respondent did not abate this condition until the inspector ordered the miners withdrawn from the lube bay.

Considering the statutory criteria, I consider that the proposed penalty of \$1,250 is appropriate. It should be affirmed.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are made:

1. The Commission has jurisdiction to decide these cases.

WEST 81-79-M

2. Respondent violated the mandatory standards as alleged in Citation Nos. 576949, 576958, 576959, 577061 A, and 577061 B. Further, the proposed penalties in the total sum of \$2,122 are appropriate for such violations and they should be affirmed.

3. The settlement of Citation 576953 is approved together with the amended penalty of \$65. The violation as alleged is affirmed but it shall not be classified as significant and substantial.

4. Respondent's motion to withdraw its notice of contest as to Citation 576960 is granted. The citation and proposed penalty of \$195 are affirmed.

5. Respondent did not violate the mandatory standards as alleged in Citation Nos. 576954, 336285, and 577061 C. Accordingly, said citations and all proposed penalties therefor should be vacated.

WEST 81-81-M

6. Respondent violated the mandatory standard as alleged in Citation 337741. Further, the proposed penalty of \$1,250 is appropriate and it should be affirmed.

ORDER

Accordingly it is ORDERED:

WEST 81-79-M

1. That the following citations and the penalties provided therefor are affirmed:

<u>CITATION NO.</u>	<u>PENALTY</u>
576949	\$ 255
576958	122
576959	295
577061A	725
577061B	725

2. The settlement of Citation 576953 is approved and a penalty of \$65 is assessed.


3. Citation 576960 and the proposed penalty of \$195 are affirmed.

4. Citations 576954, 336285, and 577061C and all proposed penalties therefor are vacated.

WEST 81-81-M

5. Citation 337741 and the proposed penalty of \$1,250 are affirmed.

6. Unless previously paid, respondent is ordered to pay the total sum of \$3,632 within 40 days of the date of this order.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

FEB 14 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 81-319-M
Petitioner	:	A.C. No. 48-01181-05032 I
	:	
v.	:	Sweetwater Uranium Project
	:	
MINERALS EXPLORATION COMPANY,	:	
Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U. S. Department of Labor, Denver, Colorado,
for Petitioner;
Anthony D. Weber, Esq., Union Oil Company of
California, Los Angeles, California,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Minerals Exploration Company, with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits began on October 5, 1982 in Laramie, Wyoming.

Respondent filed a post trial brief.

Issues

The issues are whether respondent violated the safety regulation and, if so, what penalty is appropriate.

Jurisdiction

Respondent admits jurisdiction (Tr. 230).

Citation 337761 alleges respondent violated Title 30, Code of Federal Regulations, Section 55.18-2(a) 1/

Summary of the Evidence

MSHA's evidence: Arnold Acosta, respondent's safety director, advised MSHA Inspector Martin Kovick that an employee had turned over his scraper in the pit area (Tr. 159-162). The men went to the site of the accident, a stockpile area. They learned that while employee Martinez was dumping his load the rear end of the scraper slipped and the scraper turned over (Tr. 162-164).

Martinez, the injured driver, was to dump his load on top of the topsoil pit. A blade was to then smooth it off.

Photographs showed ruts where the loader slipped over the side of the area and they showed where the operator attempted to right his vehicle (Tr. 164, Exhibits P2-P5). The 20 foot roadway narrowed at its most narrow point to 17 1/2 feet (Tr. 164, 165).

In the inspector's opinion the accident would probably not have occurred if the area had been adequately bermed (Tr. 167). Further, a three to one slope would probably have prevented the accident (Tr. 167). Possibly the accident would have occurred on a two to one slope but not on a four to one slope (Tr. 174). It is the company's policy to maintain an angle at three to one but half of the employees were not aware of that policy (Tr. 168).

In the inspector's opinion the slope was too steep for the scraper. But the inspector did not measure it, nor did he determine the extent of it and he did not know what it was at the time of the accident (Tr. 175).

There was nothing to indicate that the operator had examined the work place before the shift (Tr. 169, 176). But the inspector didn't recall if he had asked Mr. Day, the supervisor, if he performed an inspection (Tr. 177). But Day told the inspector it was okay to dump there (Tr. 178).

Respondent's evidence: David Day, a field shift supervisor, and scraper operator Baca testified for the respondent (Tr. 183, 184, 209).

1/ 55.18-2 Mandatory. (a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

On October 26 Day assigned Leonard Martinez and Fred Baca to strip topsoil in the C3 pit area (Tr. 185). The work shift began at 4 o'clock. Day arrived at the topsoil pile about 4:30 p.m. The operators had picked up their equipment from the ready line. When he arrived at the site the men got into Day's pickup and they drove the entire area, locating the limit stakes. They drove to the top of the topsoil. At that point Day pointed out a muddy area 15 to 20 feet in diameter (Tr. 186, 187). Day asked Baca to put two or three loads in the mudpile and for the blade to smooth it over to make a good base for the scrapers (Tr. 187). It took about 15 minutes for three men to drive the area (Tr. 189). During his drive around the area Day pointed out the mudhole but he didn't see any hazards affecting safety (Tr. 190).

Day learned about the rollover around 7:30 p.m., as dusk was settling in. He was then enroute to get a portable light for the dumping area (Tr. 189, 190).

Day had been working dirt with heavy equipment for three years. Starting at the north end of this stockpile there was very little slope at the edges, not less than a 4 1/2 to 5 to 1 angle. Proceeding southward the slope was about 5 to 1 (Tr. 191, 192). The banked roadway varies from a 6 to 1 slope to a 3 to 1 slope. The angle of the slope where the scraper rolled over was 5 to 1 or between 5 1/2 to 6 to 1 (Tr. 193).

Day examined the scraper's tracks. In his opinion the front end of Martinez's scraper went over the edge. Martinez could then have turned his scraper downhill or he could have waited for assistance. But he tried to drive back uphill and this caused the scraper to slide further downhill (Tr. 197). Martinez was capable of operating the scraper safely. He had driven it for a week in daylight. Further, he had been trained to operate the scraper. (Tr. 198).

Since the rollover accident the company has a written policy that there must be a 3 to 1 slope at the edge of the stockpile area (Tr. 199).

Day will evaluate slopes four to five times during a workshift. In reclamation they work 5 to 1 slopes (Tr. 200).

For various reasons MSHA's photographs do not show the angle of repose (Tr. 201-206).

Baca did not see any hazards at the site. Day instructed the operators to dump close to the edge so the blade could widen the pile (Tr. 212). The slopes of the topsoil pile varied from 3 to 1 to 5 to 1 (Tr. 213, 214).

Baca didn't see the rollover but he saw the scraper lights shining in the air. He also saw Martinez crawling out of the overturned equipment (Tr. 212, 213).

MSHA's Rebuttal

This evidence purports to measure the angle of repose from the photographs. But Inspector Kovick had never taken angles from a photograph. Further, he had not been trained in that regard (Tr. 222).

Discussion

Section 55.18-2 requires, in part, that the operator designate a competent person to examine a working place at least once each shift for conditions that might adversely affect safety or health. MSHA's failed in its burden of proving the initial requirement of the regulation. In addition, Day's experience establishes his expertise. Further, it is virtually uncontroverted that Day made an inspection with operators Baca and Martinez at the beginning of the shift.

The evidenciary thrust of petitioner's case concerning adverse safety conditions is twofold: first, it is asserted that at the point of the turnover the area was not bermed. Further, it is asserted that an excessively sharp slope at the edge of the stockpile, (less than an angle of 3 to 1), caused the rollover.

On the issue of whether the area was adequately bermed I conclude that berms were not required. Witnesses Kovick referred to a "roadway" as being 20 feet wide. (Tr. 164, 165). But on this issue I credit Day's testimony that the area where the accident occurred was the area where the topsoil was being dumped by the scrapers (Tr. 186). In addition, if the factual situation called for berms, then MSHA should have cited respondent for violating the applicable berm or dumping regulation.

The additional facet of petitioner's case is that the excessively sharp slope caused the rollover. On this point I credit respondent's evidence. Witness Day, in charge of the area, and inspecting it daily was in a much better position than the inspector to testify as to the angle of the slope. I credit Day's version that the slope varied at various points between an angle of 3 to 1 to an angle of 7 to 1.

The inspector's contrary conclusion concerning the angle of the slope is not persuasive. He didn't measure, didn't determine, and didn't know the angle of the slope.

Further, I reject MSHA's rebuttal evidence. The measurements on Exhibits P6 and P7 do not establish the extent of the angle of

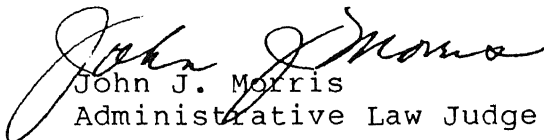
the slope. For one thing there is no permanent or fixed point in the photographs than can form a basis to judge the angle. In addition, the horizon in both photographs sits at different angles. Finally, the inspector lacks training and expertise to arrive at any conclusions that would establish an angle of repose by drawing lines on photographs.

Based on the facts and the conclusions of law stated herein I conclude that Citation 337761 should be vacated.

Accordingly, I enter the following:

ORDER

Citation 337761 and all proposed penalties therefor are vacated.


John J. Morris
Administrative Law Judge

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FEB 15 1984

KENNETH D. PITTMAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 82-334-D
v.	:	
	:	MSHA Case No. HOPE CD-82-25
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Rowland No. 3 Mine

DECISION

Appearances: F. Alfred Sines, Jr., Esq., Anderson, Sines & Haslam, L.C., Beckley, West Virginia, for Complainant;
Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Steffey

Pursuant to an order consolidating issues and providing for hearing issued December 22, 1982, an 8-day hearing in the above-entitled proceeding was held on February 1 through February 4, 1983, and April 5 through April 8, 1983, in Beckley, West Virginia, under section 105(c)(3), 30 U.S.C. § 815(c)(3), of the Federal Mine Safety and Health Act of 1977. The complaint was filed on July 29, 1982, as amended on September 27, 1982, by Kenneth D. Pittman alleging that he was unlawfully discharged by Consolidation Coal Company on January 18, 1982, in violation of section 105(c)(1) of the Act. The complaint was filed under section 105(c)(3) of the Act after complainant had received a letter from the Mine Safety and Health Administration advising him that MSHA's investigation of his complaint had resulted in a finding that no violation of section 105(c)(1) of the Act had occurred.

Complainant filed his initial brief on June 20, 1983, and respondent filed its brief on August 18, 1983. Complainant filed a reply brief on September 20, 1983. In addition to the usual credibility determinations which have to be made in most discrimination proceedings, respondent's brief poses the following issues: (1) Did complainant engage in any protected activities prior to his discharge? (2) If complainant did engage in any protected activities, did those activities contribute in any way to complainant's discharge? (3) Assuming, arguendo, that complainant did engage in protected activities, did Consolidation Coal Company (Consol) have a legitimate business reason for discharging him for matters which are not protected under the Act? (4) As a matter of policy, would a disobedience of the mining laws be encouraged, if it were to be

found that complainant engaged in a protected activity when he knowingly carried out an unlawful order given to him by the mine foreman?

On the basis of credibility determinations hereinafter made, I find that complainant's discharge was not motivated by any protected activities and that complainant was discharged for legitimate business reasons. It is unnecessary for me to consider the fourth issue raised in Consol's brief because the facts do not support a finding that Consol's management ordered complainant to produce coal in violation of the mandatory health and safety standards.

Findings of Fact

Based upon the demeanor of the witnesses and the reliable, credible evidence, the following findings of fact are made:

1. Complainant, Kenneth D. Pittman, began working for coal companies in February 1970 (Tr. 13). He received a certificate as a certified mine foreman on April 13, 1976, and began working for respondent, Consolidation Coal Company, on May 15, 1976, as an assistant section foreman (Exh. 3; Tr. 19; 24). He received a promotion to section foreman in August 1976 and continued working in that capacity until he was discharged on Monday, January 18, 1982, for producing coal without establishing and maintaining adequate ventilation in the working section or, in the words used in his personnel file, for "unsafe work performance" (Tr. 54).

2. The events leading up to Pittman's discharge began to occur on Friday, January 15, 1982. On that day, Pittman started producing coal in five entries which were to be developed to the right of a pillared-out area in the 3B Section of Consol's Rowland No. 3 Mine (Exh. 21; Tr. 76). Pittman recognized at the beginning of his day shift that an inadequate volume of air was available on his section because the blades in his anemometer would not turn when he tried to obtain an air reading for the No. 1 entry which he was planning to cut into the new producing area (Tr. 87). He believed that some air was leaking around the temporary curtains which had been placed across the entries leading into the pillared-out area and he also believed that some air was going back down the track entry outby the prospective new producing area (Tr. 89; Exh. 21).

3. Pittman called the mine foreman, Fred Thomas, on the phone and advised him that he was unable to obtain any air in the new area and that he believed the air was primarily bleeding into the pillared-out area and was passing through the gob to the outside of the mine through some holes or "punchouts" which had been made to the surface for the express purpose of preventing a build up of noxious gases in the pillared-out area (Tr. 90). Thomas asked Pittman about the condition of his curtains and Pittman told Thomas that he had already hung

double curtains along the pillar line. Thomas replied that Pittman had put his curtains in the wrong place because they should have been placed about one break outby the pillar line, but Pittman advised Thomas that he had already installed them on the gob line or pillared-out area and that he believed he needed seven permanent stoppings made of cinder blocks to prevent air from leaking into the gob area (Tr. 1800). Thomas replied that he believed Pittman only needed four permanent stoppings (Tr. 91).

4. Pittman claims that Thomas told him to go ahead and produce coal as well as he could and that he would immediately send in some blocks for construction of permanent stoppings (Tr. 101). Pittman said that the dust on the section was so bad that if you stood on the right side of the continuous-mining machine, you "couldn't see anything" (Tr. 101). Although the men on Pittman's crew complained about excessive dust, they produced 109 shuttle cars of coal before quitting time at 3:30 p.m. (Tr. 102-103). The miners produced coal in the extremely dusty atmosphere because they understood that Pittman might get fired if he had refused to produce coal in accordance with Thomas' alleged instructions for Pittman to produce coal as well as he could until the cinder blocks requested by Pittman could be sent to the 3B Section (Tr. 125; 467; 929; 980; 1121; 1138).

5. The day following the production of coal without adequate ventilation was Saturday, January 16, 1982. Saturday is used for maintenance work rather than production of coal. Pittman was the only section foreman who was scheduled to work on January 16, 1982 (Tr. 110). Six miners were assigned by Thomas to assist Pittman in advancing the conveyor belt on 3C Section where Pittman did not normally work (Tr. 110-113; 115). Although some supplies were taken to Pittman's 3B Section on Saturday (Tr. 848), those supplies did not include the cinder blocks which Thomas had allegedly promised to send to Pittman's section on the previous day (Tr. 116). Thomas did not have the cinder blocks delivered to the 3B Section because he believed that the available men should be used for the purpose of replacing some trailing cables on equipment in the 3A Section (Tr. 848; 1810).

6. The next day on which Pittman worked was Monday, January 18, 1982. Pittman claims that he reported for work about 7:30 a.m. and inquired of miners who had worked on the midnight to-8 a.m. shift whether any cinder blocks had been taken to the 3B Section during that shift and received a negative reply. Pittman claims that he talked to Thomas about the urgent need of construction of permanent stoppings along the pillared-out area in 3B Section and that Thomas promised to send into the mine the cinder blocks needed for construction of permanent stoppings. Pittman alleges that when he arrived on his section on Monday, he had the usual Monday safety meeting, found that

he had "no" air, and again called Thomas, as he had on Friday, and told him that he had no air and that the men were refusing to work without air (Tr. 121-122). Thomas again allegedly told Pittman to get the men to work and that Jerry Toney, the belt foreman, was in the process of bringing in blocks to build the stoppings (Tr. 123). Pittman passed on to his crew Thomas's alleged request that they work and they again agreed to work without adequate ventilation because they knew that Thomas had threatened several times to discharge Pittman (Tr. 125; 199).

7. Jerry Toney subsequently arrived on the 3B Section with two flatcars loaded with cinder blocks as well as two supply men to unload the blocks and three miners to stack the blocks in the places where Thomas had ordered the construction of permanent stoppings (Tr. 1697). Pittman asked Jerry Toney if he needed any of Pittman's crew to help in constructing the stoppings and Toney replied that he only needed Pittman's unitrak or scoop operator for the purpose of hauling the blocks to the respective locations where the stoppings were to be constructed (Tr. 126; 1699). Although Pittman claims that Toney instructed him to produce coal while the stoppings were being constructed, Toney claims that no such question regarding the production of coal arose because Pittman's crew was already producing coal at the time he arrived on Pittman's 3B Section (Tr. 126; 1011; 1700). Toney's version of that conflicting testimony is accepted as correct because the dispatcher's report shows that Pittman reported that production had begun at 8:42 a.m. and that Toney did not arrive on the 3B Section until 9:51 a.m. (Exh. C). Toney's crew was able to stack the blocks as fast as the unitrak operator delivered them at the respective stopping sites so that the stacking of all of the permanent stoppings had been completed by 1 p.m. (Tr. 1042; 1701).

8. When Pittman called out his midday production report on Monday, the mine foreman, Thomas, answered the phone and advised Pittman that the mine superintendent, Norman Blankenship, and a newly hired mine engineer, Kent Wright, would be visiting his 3B Section that afternoon and Pittman replied that "Everything looks good to me" (Tr. 1890). Jerry Toney left the 3B Section about 1 p.m. to check on a newly installed belt conveyor in the 3C Section and encountered Blankenship, Thomas, and Wright in that section (Tr. 1702-1703). Toney soon thereafter returned to the 3B Section and advised Pittman that his superiors were on their way to visit his 3B Section (Exh. C). Pittman told Toney that "Everything's okay" (Tr. 1704).

9. About 2 p.m., Blankenship, Thomas, and Wright arrived on the 3B Section and Blankenship very soon thereafter found the operator of the continuous-mining machine producing coal under such dusty conditions that Blankenship could hardly see the lights on the machine (Exh. C; Tr. 2006). Blankenship

immediately ordered the operator to back the continuous miner out of the entry until ventilation could be restored (Tr. 154; 1893). When Pittman asked Blankenship what was happening, Blankenship asked Pittman to obtain an air reading and Pittman replied that he could not do so because he had lost his watch (Tr. 2006). Blankenship went to the main intake entry for the 3B Section and obtained an air velocity of 26,000 cubic feet per minute (cfm) which he knew was sufficient to provide the required 9,000 cfm at the last open crosscut as well as the required 3,000 cfm at each working face (Tr. 1706; 2007). Blankenship also found that some pieces of belting being used as a stopping at the No. 2 entry inby the tailpiece had space between the pieces of belt so that a considerable amount of air was leaking down the conveyor belt entry and Thomas and Jerry Toney found that a check curtain in the No. 3 entry was torn and only partially hung so that air was escaping into that entry (Tr. 1705; 1897; 2008). After curtains were placed over the belting in the No. 2 entry and additional curtains were hung in the No. 3 entry, Blankenship and Thomas obtained an air velocity of 16,500 cfm in the intake of the area where Pittman had been producing coal and a velocity of 13,400 cfm in the last open break of the area where Pittman had been producing coal (Tr. 1707; 1898; 2009).

10. Blankenship then asked Pittman to take a reading behind the curtain in the entry where the continuous miner had been operating and told him to resume production of coal if everything was all right (Tr. 2009-2010). A period of only 15 minutes elapsed between the time Blankenship found inadequate air and the time when production was resumed (Tr. 1710; 1897; 2009). Blankenship watched the continuous-mining machine run long enough to satisfy him that the ventilation problem no longer existed (Tr. 2010). The operator of the continuous-mining machine, Basile Green, testified that the dusty conditions under which he had been working all day were eliminated after Blankenship stopped production and worked on the ventilation system (Tr. 1120; 1136).

11. After Blankenship, Thomas, and Wright had returned to the surface of the mine on Monday, Blankenship checked the fireboss books and found that Dennis McConnell, the section foreman who worked on the evening, or 4 p.m.-to-midnight shift, on Friday, January 15, 1982, had reported air velocities of 9,100 cfm for both the intake and last open break (Exh. 18, p. 55; Tr. 1648) and that Pittman had reported 9,000 cfm for the intake and no entry was made for the last open break (Exh. 18, p. 53; Tr. 108). McConnell had, by then, already reported for work on Monday so that Blankenship was able to ask him in person whether he had just written that figure in the book or had actually obtained it. McConnell assured Blankenship that he had actually obtained the velocities shown in the book and

also advised Blankenship that the shift foreman, George Taylor, had been on the 3B Section on Friday and had also taken an air reading. Blankenship asked Taylor what velocity he had obtained and he stated that he had obtained a velocity of 10,000 cfm at the last open break. Blankenship noted that no entries in the book, including those reported by Pittman, had been less than the required velocity of 9,000 cfm (Tr. 2011-2012). Blankenship then ordered Thomas and Pittman to report to his office as soon as Pittman had come out of the mine at the end of his shift (Tr. 2013).

12. After Pittman and Thomas had reported to him, Blankenship advised Pittman that the operator of the continuous-mining machine and his helper had told him when he stopped them from mining that they had complained to Pittman about the dust at the beginning of the shift and that Pittman had asked them to run the miner because Jerry Toney was coming to the section to construct permanent stoppings so as to provide the air velocity they needed (Tr. 2014). Blankenship said that Pittman stated that Thomas knew he was producing coal without adequate ventilation. Thomas's reply to that allegation was that Pittman was telling a "damn lie" (Tr. 2015). Blankenship stated that he believed Thomas was telling the truth because he had already had Pittman lie to him on previous occasions and that he knew that Thomas was aware of his feelings pertaining to safety and that he did not believe Thomas would have taken him to the 3B Section if he had known in advance that Pittman was operating without adequate ventilation (Tr. 2020). Blankenship reminded Pittman of the times when he had warned Pittman about producing coal in violation of the roof-control plan and about having suspended Pittman for 5 days without pay for a second violation of his instructions as to the construction of cribs before making a pushout in a pillaring operation (Tr. 2013).

13. Blankenship was called out of his office during his discussion with Pittman. He talked with Thomas in the hall at that time and asked Thomas to give Pittman an opportunity to resign so that no record of a discharge would show in his personnel file. When Blankenship returned to the office, Thomas advised him that Pittman would not quit. Therefore, Blankenship discharged Pittman as of that day, January 18, 1982 (Tr. 2019).

The findings of fact set forth above support a conclusion that Consol's management discharged Pittman for knowingly operating his section without adequate ventilation in violation of Federal regulations and Consol's ventilation system, methane, and dust control plan (Exh. 19). The preponderance of the evidence, as hereinafter explained, supports a finding that Pittman's discharge did not involve a violation of section 105(c)(1) of the Act.

Consideration of Parties' Arguments

Overview of Parties' Briefs

Pittman's initial brief argues in Part I (pp. 8-18) that Pittman made safety complaints to the mine foreman about a lack of adequate ventilation on his section and that those complaints were protected activity under section 105(c)(1) of the Act which provides as follows:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to the Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Pittman's initial brief contends in Part II (pp. 19-30) that the motivation for Pittman's discharge was his having annoyed the mine foreman by making complaints about inadequate ventilation on his section on Friday and Monday and by having urged the mine foreman on Saturday to send cinder blocks to his section so that permanent stoppings could be constructed. Pittman's brief has a Part III (pp. 31-37) which does not begin with a subject-matter heading, but that portion seems to be devoted to an argument that Pittman's discharge involved disparate treatment. Part IV (pp. 38-40) concludes that

Pittman would not have been discharged if it had not been for his reporting of inadequate ventilation to the mine foreman. 1/

Consol's brief (Part I, p. 1) states correctly that Pittman was discharged for knowingly having operated his section on Monday without adequate ventilation. Pittman's excuse for having violated an important health and safety regulation was that the mine foreman had asked him to produce coal until such time as cinder blocks could be brought into the mine for construction of permanent stoppings.

Part II (pp. 1-2) of Consol's brief lists the issues which I have already noted in the second paragraph of this decision. Part III (pp. 2-8) of Consol's brief is entitled "Testimonial Facts" and provides an accurate summary of the record. Part IV (pp. 9-34) of Consol's brief discusses all of the issues raised in this proceeding and contends that Pittman was not discharged for having engaged in any activity protected under the Act. Consol argues that Pittman was treated no differently from other employees who have been discharged or otherwise disciplined. Consol's brief shows that the documentary evidence introduced in this proceeding was produced before Pittman was discharged and that the preshift books show that Pittman deliberately falsified the records in an attempt to support his claim that he could not obtain an adequate amount of air on his section on January 15 and 18, 1982, without having permanent stoppings constructed, that the credibility of all of the UMWA employees who testified in Pittman's behalf was largely destroyed by their inconsistent testimony and by the fact that one of Pittman's witnesses, Randy Workman, testified with great vividness and detail about facts which occurred at the mine on January 15, 1982, although Workman did not actually report for work on that day. Part V (p. 35) of Consol's brief is a conclusion asserting correctly that Pittman's complaint should be dismissed for failure to show that his discharge involved a violation of section 105(c)(1) of the Act.

1/ Pittman's initial brief contains a number of factual errors. For example, on page 4 of the brief, it is stated that Pittman worked for Consol for 4 years and 11 months, but on page 41, it is stated that he worked for Consol for 5 years and 10 months. Pittman worked for Consol from May 15, 1976, to January 18, 1982, or 5 years, 8 months, and 3 days. On page 6 of Pittman's initial brief, three different miners are given job classifications different from those which they had when they were working under Pittman's supervision. The errors result from failure to distinguish the jobs which the persons held at the time they testified in 1983 from the jobs they were performing when they were working under Pittman's supervision. Pages 36 and 37 of the brief repeat the same arguments made on pages 35 and 36.

Part I (pp. 1-2) of Pittman's reply brief claims that Consol's safety record at the Rowland No. 3 Mine may be based on misleading statements in accident reports. Part II (pp. 2-5) addresses the issue of credibility by arguing that company or managerial employees have more reason to testify falsely than UMWA or wage employees because UMWA employees are protected from discrimination by their Wage Agreement, whereas managerial employees are vulnerable to discharge and denial of promotional advancement if they should testify in support of an employee who has been discharged. Part III (pp. 5-6) of Pittman's reply brief argues that Pittman is not the only employee Consol or an affiliate has discharged for "just following orders", citing Judge Fauver's decision in Roger D. Anderson v. Itmann Coal Co., 4 FMSHRC 963 (1982). Part IV (pp. 6-16) of Pittman's reply brief argues that Consol's motivation for discharging Pittman was its obsession with achieving production as cheaply as possible at the expense of slighting safety considerations. Pittman's reply brief does not even attempt to answer the precise credibility issues discussed in Consol's brief.

The Parties' Burden of Proof in Discrimination Cases

The test for determining whether a complainant has shown a violation of section 105(c)(1) of the Act was given by the Commission in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom., Consolidation Coal Co. v. Ray Marshall, 663 F.2d 1211 (3d Cir. 1981). Some of the Commission's language pertaining to the burden of proof was temporarily reversed in Wayne Boich d/b/a W. B. Coal Co. v. F. M. S. H. R. C., 704 F.2d 275 (6th Cir. 1983), but there-after the court vacated its decision reported at 704 F.2d 275, except for its rulings as to back-pay issues, in Wayne Boich d/b/a W. B. Coal Co. v. F. M. S. H. R. C., 719 F.2d 194, Sixth Circuit No. 81-3186, October 14, 1983, leaving intact the Commission's rationale regarding the requirements for proving a violation of section 105(c)(1) of the Act. The test set forth by the Commission in Pasula reads as follows (2 FMSHRC at 2799-2800):

We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's

unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. [Emphasis in original.]

Pittman's Discharge Was Not Motivated By Pittman's Protected Activity

As indicated in Finding No. 3, supra, Pittman called Thomas, the mine foreman, on Friday, January 15, 1982, to report that he did not have any air on the section. The discussion which ensued shows that Thomas inquired about the condition of Pittman's temporary stoppings and suggested to Pittman that he had erected them in the wrong places, but Pittman defended his placement of the curtains and contended that his lack of adequate ventilation would be eliminated only if permanent stoppings were installed along the gob line or the pillared-out area from which they had withdrawn on the previous day, January 14. Thomas agreed to send in cinder blocks for construction of permanent stoppings along the gob line, but Pittman claims that Thomas told him to produce coal until such time as the permanent stoppings could be constructed (Exh. 21).

As indicated in Finding No. 4, supra, Pittman's crew produced 109 shuttle cars of coal on Friday despite the dusty conditions which prevailed. The miners produced coal without adequate ventilation because they understood that Pittman had been threatened with discharge by Thomas and they did not want to endanger Pittman's job by refusing to work until adequate ventilation had been established. Although Pittman worked on Saturday, January 16, 1982, which was a nonproducing day, he worked on an extension of the conveyor belt in 3C Section and no cinder blocks were sent to his 3B Section on Saturday (Finding No. 5, supra).

On Monday, January 18, 1982, Pittman again failed to find an adequate velocity of air on his section and again called Thomas and advised him that he did not have any air on the section and again Pittman claims that Thomas asked him to produce

coal until such time as Jerry Toney could bring in cinder blocks and construct permanent stoppings on the section. Pittman thereafter, as he had on the previous Friday, told his men that Thomas wanted him to produce coal until the stoppings could be built and the men again produced coal with the realization that Pittman's job would be jeopardized if they declined to run coal until adequate ventilation could be provided (Finding No. 6, supra).

Pittman's initial brief (pp. 19-30) argues that Pittman's calls to Thomas concerning ventilation were safety complaints which irritated Thomas so much that Thomas said nothing in Pittman's defense when the mine superintendent, Blankenship, inspected the 3B Section on Monday and discharged Pittman after finding him to be producing coal without adequate ventilation (Finding Nos. 9-13), supra).

There can hardly be any argument but that a section foreman's report to the mine foreman of inadequate ventilation is an act which is protected under section 105(c)(1) of the Act, but under the Pasula test, supra, Pittman is obligated to prove that his discharge "* * * was motivated in any part by the protected activity." Even if everything Pittman alleged in this proceeding were true, neither Thomas nor Blankenship would have had any reason for discharging Pittman for calling Thomas on Friday and Monday to report that he had inadequate ventilation on his section. Thomas, of course, did not discharge Pittman, but if he had, Pittman's reporting of inadequate ventilation would not have been an irritant to Thomas because Exhibits A and C show that Pittman produced at least an average amount of coal on both Friday (109 shuttle cars) and Monday (100 shuttle cars). Pittman's production was greater than that achieved by 3C Section on both days and greater than 3A Section on Friday. On Monday, the 3A Section did outproduce Pittman's 3B Section by 11 shuttle cars.

Both of Pittman's briefs argue extensively (Initial, pp. 19-30, and Reply, pp. 6-8) that Thomas was so production oriented, that he would have been greatly upset with Pittman for calling him on two successive production days to advise him that there was "no" air on the section. Since Thomas obtained a very satisfactory run of coal from Pittman's section on both days, Pittman's claim that his calls about a lack of air on his section annoyed Thomas so much that Thomas wanted to see him discharged is not supported by the preponderance of the evidence. Thomas did not send the cinder blocks which Pittman requested until Monday. Since Pittman's calls did not cause Thomas to take action toward constructing permanent stoppings any sooner than he had planned to do so, there is nothing in the record to show that Pittman's having reported inadequate ventilation to Thomas on Friday and Monday would have been such an annoyance to Thomas that he would have been motivated by

those calls to discharge Pittman for that reason. Therefore, for the reasons given above and for the reasons hereinafter given, I reject Pittman's claim that his discharge was motivated by Pittman's protected activity of having reported inadequate ventilation to Thomas on Friday and Monday.

I have noted that the parties' briefs refer repeatedly to certain incidents which occurred during Pittman's 5 years and 8 months of employment by Consol. In order to facilitate the parties' review of my decision, and the Commission's review if a petition for discretionary review is subsequently granted, I am setting forth below a Table of Contents to assist the parties in finding the place in my decision where I have indicated my findings with respect to various factual and legal arguments made by the parties.

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Pittman's Testimony Must Be Given a Very Low Credibility Rating

Consol's brief (pp. 23-34) pointed out so many credibility defects in Pittman's testimony, that Pittman's reply brief did not even attempt to rebut Consol's specific arguments. All that Pittman's reply brief (pp. 2-5) could use as a rebuttal argument was that the company or managerial employees who testified on behalf of Consol are more likely to perjure themselves than the UMWA employees who testified on behalf of Pittman because UMWA employees are protected from discriminatory action by their Wage Agreement, whereas managerial or salaried employees are completely at the mercy of Consol if they fail to support Consol's position in a discrimination proceeding. There is no doubt some validity in Pittman's argument that managerial employees are likely to be motivated toward supporting their employers and I always take that tendency into consideration in evaluating their testimony. On the other hand, UMWA employees are prone to support each other, especially when the discipline handed out to a section foreman, as in this case, spills over onto the UMWA employees who were working for the section foreman who is disciplined. Inasmuch as Blankenship criticized the operator of the continuous-mining machine for running without adequate ventilation, he also had a reason for supporting Pittman's claim that the only reason they were running without adequate ventilation was that Thomas had asked Pittman to get them to run coal despite a lack of adequate ventilation (Tr. 1154).

Credibility of witnesses, however, is a matter which a judge learns to perceive on the basis of their demeanor while testifying and on the basis of the pattern of inconsistent testimony which accrues in a lengthy hearing such as the one in this proceeding. I shall hereinafter demonstrate by specific references to the record why I believe that nearly all the allegations made by Pittman in this proceeding must be rejected in their entirety as being outright fabrications made in a desperate effort to regain the job which he lost by reason of incompetence or indifference or both.

Pittman's Unsupported Claim of Having Erected and Rechecked Temporary Stoppings

Pittman testified that he had his crew erect double curtains as temporary stoppings along the pillared-out area on

Friday, January 15, 1982, and also had them install temporary stoppings in the original area of development of the 3B Section to prevent air from going down the track or belt entry (Exh. 21; Tr. 82-87). After the work on stoppings had been completed, Pittman claims that he tried to take an intake air reading in the No. 1 entry of the new places which they were going to start driving to the right of the pillared-out area, but Pittman claims that his anemometer would not even turn (Tr. 88). He then called Thomas, the mine foreman, and told him that he could get no air on his section. Thomas advised Pittman to go hang some curtains, but Pittman replied that he had already hung the curtains and still could not obtain air for his section. Pittman then told Thomas that he would not be able to ventilate the new producing area until seven permanent stoppings had been constructed (Tr. 93-100). Pittman claims that Thomas subsequently asked him to produce coal until the stoppings could be constructed and he did so (Tr. 100-101).

On Monday, January 18, 1982, Pittman again could obtain no air reading and called Thomas to advise him that he had no air and that the men were refusing to work until an adequate amount of ventilation could be provided. Pittman claims that Thomas again asked him to get the men to produce coal until cinder blocks could be delivered to the 3B Section and permanent stoppings could be built. The men again produced coal without having adequate ventilation (Tr. 123-125).

Despite Pittman's claim during his direct testimony that he had his men erect double curtains along the gob area and inby the belt, he was unable on cross-examination to state how many curtains were already up or how many he hung even though he also claimed that he "* * * went over them myself and proceeded to tighten them all up and do everything to them" (Tr. 323). Pittman tried to excuse his failure to obtain an adequate amount of air by saying that he did not have authority to ask that supplies be brought in (Tr. 369), but he had testified previously that he had requested 15 curtains to be brought in on January 14 and that he had received them on January 15 and had used them to install double curtains along the gob line (Tr. 82). Moreover, Pittman testified that "* * * I required a stopping to be erected across the belt entry because of the loss of such a high amount of air being lost going back down across the overcast and the belt" (Tr. 279). Subsequently, Pittman stated that the cinder blocks had been delivered for construction of his "required" stopping, but that the stopping was never actually built and, if it had been, it would have stopped the bleeding of air down the belt entry to the track (Tr. 412).

Pittman eventually testified that he did not know how many curtains he erected along the gob line, that he had two men working on them and that they did not work together and that he

did not know what his men had done. When he was reminded that he had said the curtains were nailed to wood, he said that a wooden piece is attached to a roof bolt in each entry during initial development in case a stopping is needed at a later time in any entry and that all stoppings are nailed to that piece of wood (Tr. 440-442). Although Pittman had originally claimed that he had his men hang double curtains along the gob line, Pittman eventually testified that he could not say for certain that he or his men had erected any stoppings or whether they had merely tried to tighten curtains which already existed along the gob line (Tr. 443).

I agreed with Pittman that it might be reasonable for him not to know for certain what his men had done (Tr. 443), but it later turned out that when the men on his crew testified, they did not know what they had done either. Danny Blevins, the roof-bolting machine helper, testified only that he and the operator of the roof bolter "* * * tightened up the air coming up there to the working place there" (Tr. 448).

Darrell MacDaniel, the helper to the operator of the continuous-mining machine, testified that he thought the evening shift had hung some curtains and that he and the operator of the continuous miner hung some curtains. He first stated that none of the curtains were nailed at the bottom and admitted that failure to secure the curtains at the bottom would allow air to leak under the bottoms of the curtains (Tr. 883). Thereafter, he supplemented his testimony by stating that they had done all they could with the curtains "* * * unless you might have put something heavy on [the bottoms of the curtains]. I don't know. There was timbers and stuff, but I don't know if that would have helped or not" (Tr. 890).

Theodore Robert Milam, the mechanic on Pittman's 3B Section, testified that on Friday, January 15, 1982, "everybody" helped hang curtains along the pillared-out area and that they "put crib blocks and timbers on the bottom of them to keep them from blowing out, and this was done" (Tr. 904). Milam first testified on cross-examination that every member of Pittman's crew helped hang the six double-check curtains along the pillar line, but then stated that the evening shift had already hung the curtains before Pittman's crew arrived on the 3B Section on Friday morning. Milam also confirmed on cross-examination that they had used crib blocks and timbers at the bottoms of the curtains (Tr. 921). Milam further stated that if MacDaniel stated that the curtains were not nailed to timbers or fly boards at the bottom, MacDaniel was "incorrect" (Tr. 925). Despite Milam's assertion that MacDaniel was incorrect about how the curtains were secured at the bottom, he said that he "probably didn't" see all six of the curtains and that he could not say for certain how many curtains he had personally examined (Tr. 922).

Lawrence Simms, the unitrak or scoop operator, was a good friend of Pittman's and Pittman rode back and forth to work with Simms (Tr. 983; 1002). He testified that he knew there were double-check line curtains along the pillared-out area "because I hung them" (Tr. 986). On cross-examination Simms first stated that he did not "* * * know how many I actually hung, but I do know I went over there and tightened up the curtains" (Tr. 1003). Shortly thereafter, however, he said that he personally had hung "* * * three, four, maybe five or six" (Tr. 1004). Simms first testified that the curtains were secured at the bottoms with "* * * half-headers or crib blocks or something" (Tr. 1005), but then testified that he actually could not say how many were secured at the bottom (Tr. 1006).

Pittman's attorney called Andrew E. Fox as a witness to support Pittman's contentions. Fox is a consulting mining engineer with a master's degree from Virginia Polytechnic Institute (Tr. 1049-1050). Fox is also a certified mine foreman and has had experience as a section foreman, mine foreman, and mine superintendent (Tr. 1053-1054). He was shown a map or diagram of Rowland No. 3 Mine and he testified that properly hung line curtains along the pillared-out area should have been sufficient to have directed an adequate amount of air to the new area which Pittman began to drive on Friday, January 15, 1982 (Tr. 1085). He also stated that if air was leaking under the bottoms of the curtains, they had not been properly constructed (Tr. 1086). He further said that it was the responsibility of the section foreman to make certain that the curtains were properly constructed (Tr. 1087).

Basile Eugene Green was normally the helper for the operator of the continuous-mining machine, but the regular operator had been sent to work in 3C Section and Green was the operator of the continuous miner on Friday and Monday, January 15 and 18, 1982 (Tr. 1125). Green testified that he believed that Simms had hung the curtains along the pillared-out area and that he went over and tightened the curtains. He believed they were nailed to half-headers, cribs, and timbers, but he said "I'm not for sure" "* * * because "I went through there after that was done" (Tr. 1128). Although he said that "We went all the way across and tightened them up," he said that he personally tightened "Maybe one or two" (Tr. 1129). Green's testimony about what he did to the curtains was so often accompanied by words like "I believe" (Tr. 1128; 1143), "to the best of my knowledge" (Tr. 1129), and "I'm not for sure" (Tr. 1128), that one cannot make findings of fact based on such equivocal and doubtful-sounding statements.

Carlos Williams, Jr., was the operator of the roof-bolting machine (Tr. 1193). He testified that he helped tighten the curtains along the pillared-out area on Friday, January 15,

1982, but he said that tightening the curtains did not improve ventilation any (Tr. 1195). Williams testified that he and Blevins, his helper, just tightened up six curtains which had already been constructed across the pillared-out area. He could not say for sure how many they worked on but he "guessed" that they worked on all six of them (Tr. 1207). While other witnesses had said that the curtains were nailed into timbers along the sides, Williams testified that the sides of the curtains were nailed into the coal itself. When pressed as to whether there were any timbers along the sides of the curtains, Williams said that he did not remember (Tr. 1210). Williams said that they nailed the curtains to timbers or crib blocks at the bottoms if they needed it and then he said that all of them were nailed at the bottom so far as he could remember (Tr. 1210). Williams' credibility was further eroded by the fact that he claimed to have been able to know for certain that the mine superintendent, Blankenship, walked behind his roof-bolting machine on Monday, January 18, 1982 (Tr. 1219). He said that he recognized Blankenship because his roof-bolting machine has "lights all around" it and he could identify Blankenship by his white hat (Tr. 1220). When Blankenship testified, he brought his black hat into the hearing room and stated that he had had that same black hat for the 18 years during which he has been working in coal mines (Tr. 2010-2011).

Kevin Harvey was a shuttle car operator on the 3B Section on Monday, January 18, 1982 (Tr. 1222). He claims to have heard Pittman call the mine foreman, Thomas, to state that they lacked sufficient air and that they were going to need blocks to get adequate ventilation (Tr. 1224). After Pittman had called Thomas, Harvey said that he went across the pillared-out area and checked the curtains, but they were fairly tight and there was not much more they could do to them (Tr. 1226). After production was stopped by Blankenship on Monday, Harvey believes that he checked the curtains in the Nos. 5 and 6 entries along the pillared-out area, but he could not say who helped him check the curtains and he could not say whether or not he helped place plastic curtains over the unplastered cinder block stoppings which Toney and his three helpers had stacked before production was stopped by Blankenship (Tr. 1235).

Randy Dale Workman was a shuttle car operator (Tr. 1158) and he testified that he recalled working on both Friday and Monday, January 15 and 18, 1982 (Tr. 1159). He testified that he and the other shuttle car operator went to the Nos. 1 and 2 entries and checked the curtains at the pillared-out area. They then returned to the face area and wondered where everybody else was and then went back to the pillared-out area and checked the curtains in the No. 3 entry. Workman recalled vividly that some of the curtains were "* * * flying loose, some hanging down, some had to be hung back, some had to have stuff put on the bottom of them to hold them down so the air

wouldn't blow them away" (Tr. 1161). He testified that they then ran coal all day Friday under very dusty conditions (Tr. 1162).

When Workman arrived on the section on Monday, he believed that nothing had been done to improve ventilation because there was no more air on Monday than there had been on Friday (Tr. 1166). On cross-examination, Workman stated that he was just as certain about what had happened on Friday as he was about what had happened on Monday (Tr. 1172). At that point in his cross-examination, Consol's attorney introduced documentary evidence (Exhs. T, U, and V) showing unequivocally that Workman had been absent from work on Friday, January 15, 1982 (Tr. 1173). Pittman's counsel subsequently stated that Pittman had checked his records and that Pittman's records also showed that Workman was not present on Friday (Tr. 1287).

After Consol's counsel had introduced evidence showing that Workman was absent, he asked the following question and received the following answer from Workman (Tr. 1178-1179):

Q Let me ask you this question, Mr. Workman.
* * * [W]ould the reason you're recalling all these events on Friday be because you and the other members of the crew got together on what testimony you'd be offering on the events of Friday and Saturday and on Monday?

A It could possibly -- like you said, it could have happened on Monday.

Pittman's counsel thereafter introduced as Exhibit 23 a statement which Workman had given to an MSHA investigator on March 31, 1982, before Pittman's counsel was retained to represent Pittman in this proceeding. Exhibit 23 shows that Workman erroneously represented in a statement given just 2-1/2 months after Pittman's discharge that he recalled working on Friday, January 15, 1982 (Tr. 1179).

The detailed review above of the testimony of both Pittman and his crew supports a conclusion that Pittman and his crew performed, at most, a cursory examination of the curtains along the pillared-out area. The fact that they could not state for certain which curtains they purported to have built or examined shows that Pittman and his crew simply concluded that the reason for their failure to have an adequate air velocity on their section was based on Pittman's mistaken conclusion that only the construction of cinder-block permanent stoppings would provide an adequate amount of air for the new area which Pittman began to drive on Friday, January 15, 1982.

Pittman's entire case hangs on his claim that it was impossible to obtain an adequate air velocity on his 3B Section until permanent stoppings could be constructed of cinder blocks. He does not deny that he knowingly produced coal on both Friday and Saturday without having an adequate amount of air to carry the dust from the working faces. The only defense he has for deliberately violating the mandatory health and safety standards is that he called Thomas, the mine foreman, and told him that he had "no" air and asked Thomas to send in cinder blocks for constructing permanent stoppings. As I have shown above, he did not really make a concerted effort to provide air by using the curtains which had already been hung. He stated that he knew that some of the air was escaping down the belt entry to the track, but he did not tighten the curtains inby the belt entry for the purpose of preventing the loss of air down the track (Tr. 279). The scoop operator, Simms, testified that even after permanent stoppings had been constructed and plastered subsequent to Pittman's discharge, there was still an air problem because "* * * evidently it [air] was coming back down toward the power box and the belt entry" (Tr. 1017). Consequently, even if permanent stoppings had been constructed before Pittman began driving the new places to the right of the pillared-out area, construction of those permanent stoppings would not have solved the ventilation problem on Pittman's 3B Section because the air was being lost down the belt or track entry rather than being sucked into the pillared-out area as Pittman claimed.

The plain facts were correctly stated by Blankenship, the mine superintendent, when he explained that all but one of the temporary stoppings which existed on Friday, when Pittman started asking Thomas to send in cinder blocks, had already been constructed while the miners were pulling pillars. Therefore, on Friday, January 15, 1982, when Pittman's crew began to drive the new entries to the right of the pillared-out area, only one additional temporary stopping needed to be hung and that was in the area next to the half block of the No. 5 pillar which had been left standing in the pillared-out area when the miners withdrew from that area to start the new entries to the right of the pillared-out area (Exh. 21; Tr. 1992).

Simms also testified that he had constructed a stopping out of conveyor belting in the No. 2 entry just inby the belt tailpiece and that he had done so in order that he could run the scoop through the stopping made of belting without tearing down the stopping (Tr. 992). When Blankenship shut down production on Monday, after finding Pittman's crew running coal with inadequate ventilation, he, the mine foreman (Thomas), and the belt foreman (Jerry Toney) only had to put curtains over the widely spaced belting in the No. 2 entry and hang additional curtains in the No. 3 entry just inby the tailpiece

in order to restore a proper amount of ventilation to the working faces (Tr. 156; 1705-1706; 1897; 2008-2009). There can be no doubt but that a proper amount of ventilation was provided in a period of about 15 minutes because Blankenship's and Thomas's testimony to that effect is supported by the testimony of the operator of the continuous miner who said that the dusty conditions under which he had been cutting coal up to about 2 p.m. on Monday ceased to exist after Blankenship stopped production and worked on the ventilation system (Tr. 1120).

It should also be noted that all of the permanent stoppings which Pittman wanted constructed had been dry stacked, but not plastered, at the time Blankenship found Pittman's crew producing coal without adequate ventilation (Tr. 1042; 1701). Although the permanent stoppings had not been plastered, the testimony of the scoop operator, cited above, shows that even after the permanent stoppings had been properly plastered, all the section foremen still had to maintain a constant vigil over all parts of their ventilation system to keep air from leaking down the track. It is clear that the reason Pittman lacked an adequate amount of air for ventilating his section was the result of his own negligence in failing to make certain that the temporary stoppings inby the tailpiece were properly secured to prevent air from leaking down the belt entry to the track.

The claim in Pittman's initial (pp. 19-37) and reply (pp. 6-16) briefs that Thomas was solely responsible for the lack of ventilation on Pittman's section is incorrect. Fox, Pittman's own expert witness, testified that it was the responsibility of the section foreman to see that his section was operating with adequate ventilation and that it was his responsibility to maintain all the curtains and other ventilating devices in every part of his section so as to assure that his crew would be working in a safe and healthful environment (Tr. 1087-1088). Pittman's claim that he was not responsible for any part of the ventilation system except that on the working section or the portion inby the tailpiece was largely refuted by the testimony of Thomas Anderson, an operator of a continuous miner, who was called by Pittman as a rebuttal witness. Anderson testified that he and Pittman walked into the mine instead of riding the mantrip and that Pittman wrote his initials in the belt entry to show that he was firebossing the belt (Tr. 2236). Moreover, Pittman's preshift examinations for both Friday and Monday show entries to the effect that the "[t]rack [was] safe for travel" (Exh. 18, pp. 53 and 65). It is true, as hereinafter explained, that Pittman claims McConnell put entries in the fireboss book which he did not give to McConnell, but the fireboss book has numerous other entries which are attributable to Pittman, without any alleged connivance by McConnell, and he makes the comment that the track was safe to travel in most of his reports. Those fireboss entries and Anderson's testimony are rather conclusive proof

that Pittman recognized, prior to his disclaimers of responsibility made in this proceeding, that he was responsible for all parts of the ventilation system on the 3B Section. His disclaimer of responsibility is also refuted by his assertion that he "required" the construction of a stopping across the belt entry outby the tailpiece (Tr. 279).

The preponderance of the evidence supports a finding that Pittman was incorrect in claiming that he could not obtain a proper amount of air to ventilate his section because of the mine foreman's failure to send in cinder blocks for construction of permanent stoppings on Friday or Monday as soon as Pittman requested them.

Pittman's Falsifying of the Preshift-Onshift-and-Daily Report

Pittman's claim that he did not have an adequate amount of air to ventilate his section on Friday and Monday, January 15 and 18, 1982, was rather effectively destroyed by the entries in the preshift-onshift-and-daily report book, or fireboss book, which is Exhibit 18 in this proceeding. The book shows that even though Pittman claimed not to have the required velocity of 9,000 cubic feet per minute of air at the last open break and the required velocity of 3,000 cubic feet per minute at the working faces, he had called out a preshift report to another section foreman, Dennis McConnell, on Friday to the effect that he had a volume of 9,000 cfm at the intake and that on Monday he reported to McConnell that he had an intake velocity of 13,780 cfm and a last-open-break velocity of 9,600 cfm (Exh. 18, pp. 53 and 65). Although Pittman signed the book on each of those dates to show that he had made the preshift report entered on pages 53 and 65 of the book, he testified that he had reported "no" air to McConnell and that McConnell had said he had to have an entry for the book and that McConnell had written in the book the volumes just given above (Tr. 106; 159) even though Pittman had given McConnell no figures whatsoever (Tr. 106; 159). Pittman's excuse for having signed the entries made by McConnell was that he thought of his family and the economic conditions which prevailed at the time and went ahead and signed the book for fear he would be fired for failing to sign (Tr. 166). Pittman also testified that he made an onshift report on page 52 of the fireboss book without showing a lack of ventilation and that he signed the pages on which McConnell had entered erroneous air velocities because Thomas, the mine foreman, had instructed him never to show a ventilation violation in the fireboss book. According to Pittman, Thomas gave the aforesaid order because Warren Sharpenberg, a mine official, always read the fireboss books and objected to seeing any entries in the book pertaining to ventilation violations because such entries meant a reduction in the volumes of coal which would have been produced if the violations had not occurred

(Tr. 211; 214-215; 341; 344). Pittman additionally tried to justify his signing for air velocities which he had never reported by contending that Thomas was so anxious to have him report to Blankenship's office after he came out of the mine on January 18, the day of his discharge, that he did not have time even to read the air velocities which McConnell had voluntarily entered on page 65 of the fireboss book. Pittman claimed that he did not even know what velocities McConnell had entered in the book until his counsel in this proceeding obtained a copy of the fireboss book through discovery procedures (Tr. 228).

The excuse given by Pittman for deliberately and knowingly falsifying the fireboss book will not withstand close analysis for at least five reasons. First, his claim that Thomas had ordered him not to show ventilation violations in the fireboss book is not consistent with his admission on cross-examination that there were at least three pages of the fireboss book which fail to show any air readings at all (Tr. 229). Failure to show any air readings at all would be the same as showing violations of the ventilation standards which, in turn, would have raised the ire of Sharpenberg, and would have been contrary to Thomas's alleged instructions that no ventilation violations be shown in the fireboss book.

Second, since Pittman had achieved at least an average amount of production on both Friday and Monday, January 15 and 18, his reporting of a lack of adequate ventilation would not have upset Sharpenberg because the ventilation violation had no adverse effect on production. Third, his claim that Thomas rushed him so much on Monday that he did not have time to examine page 65 of the fireboss book before signing it is completely refuted by the fact that he took time to make an entry on page 65 in his own handwriting stating "Talked with pin crew on roof and rib control from 8:40 to 8:50". That entry is exactly 2-1/2 inches below the air velocity entries made by McConnell on the basis of Pittman's preshift report. It is inconceivable that Pittman would have been so rushed on Monday that he could not take time to read the air velocity volumes written by McConnell and yet had time to write a report to the effect that he had talked to the "pin crew" about roof and rib control.

Fourth, Pittman could explain the fact that McConnell, the evening-shift section foreman, and Stover and Wriston, two UMWA firebosses, obtained air velocities of at least 9,000 cfm on the same days on which he claimed there was "no air" by saying that they had entered fallacious velocities in the fireboss book because they were afraid they would lose their jobs if they had made truthful entries of air velocities (Tr. 230). That contention is contrary to the main argument in Pittman's reply brief (pp. 2-5) pertaining to credibility because I am

there asked to rule that UMWA witnesses are more likely to be telling the truth than managerial employees, who are at the mercy of Consol, as compared with UMWA employees who are protected by the provisions in their Wage Agreement. Assuming that McConnell is in the category of managerial employees whose statements cannot be believed, Stover and Wriston, who made the other entries in the book showing air velocities of at least 9,000 cfm, are both UMWA employees and have no reason to be afraid of telling the truth if their credibility is to be judged by the criterion expressed in Pittman's brief. Yet both of those UMWA firebosses testified under oath that they had actually obtained the readings of 9,000 cfm or more on the days when Pittman claimed there was "no air" on the 3B Section (Tr. 1405-1407; 1434). There may be times when a complainant in a discrimination proceeding is the only witness who is telling the truth, but the circumstances in this case do not support a finding that Pittman's claims of "no air" on Friday and Monday are to be accepted rather than the readings of three other mine examiners who obtained readings of from 9,000 to 9,800 cfm on the same days that Pittman claims there was "no air" on the section.

Fifth, Pittman's claim that he never did get an adequate amount of air on Monday is contrary to the statements he made in his complaint filed with MSHA and in a statement given to MSHA's investigator after he had filed his complaint with MSHA (Exhs. F and Q). In his statement to the MSHA investigator, he stated that Blankenship stopped production on Monday, that his men placed plastic curtains over the cinder block permanent stoppings which Toney and his men had stacked and "[w]e got the air we needed and started to run again" (Exh. F, p. 14). In his complaint filed with MSHA, he stated that "I stopped the miner and they finished the stoppings and got air to the working face" (Exh. Q). When asked about the aforesaid inconsistencies between his testimony in this proceeding and his statement made to MSHA's investigator, Pittman stated that he did not mean for those statements to be interpreted as an agreement on his part that he thought there was an adequate amount of air after Blankenship stopped production and worked on improving ventilation (Tr. 302-303). Assuming, arguendo, as Pittman contends in his reply brief that managerial witnesses cannot be believed, Green, the UMWA continuous-miner operator, testified that the dust problem which he had encountered during the shift on Monday was eliminated after Blankenship had production stopped until improvements could be made in the ventilation system (Tr. 1120).

For the reasons given above, I find that Pittman's acts of signing entries in the fireboss book which he claims were false is just another reason to doubt the truthfulness of his contentions in this proceeding. Pittman stated during cross-

examination that he knew that he could have voided the entries in the fireboss book with which he disagreed and could have written a new page on which he could have made truthful and accurate statements (Tr. 211). If, as Pittman claims, he did not have time on Monday, the day of his discharge, to look at the air velocities on page 65 of the fireboss book before he signed that page to show agreement with the entries, or if he signed because he feared he would be discharged if he made corrected entries, there was certainly nothing to keep him from going back after his discharge on Monday and voiding page 65 so that he could enter truthful air velocities on a corrected page.

Pittman's Claim that Air Measurement at Last Open Break Cannot Be as Great as Intake Air Measurement

One of the reasons given by Pittman for his assertion that McConnell had made a false entry in the fireboss book when he reported an air velocity of 9,100 cfm for both the intake and return measurements was that there is no logical way to explain how air can travel the 300-foot distance from the intake to the return without losing even 1 cubic foot per minute in velocity. Pittman compared the velocity in the air at the intake with the velocity at the return with the difference in air velocity which one experiences if he stands 2 feet from an electric fan as compared with standing 30 feet from the same fan (Tr. 222-223). Assuming that Pittman's argument is valid, his criticism would not have applied to the readings of the two UMWA preshift examiners because Wriston obtained an intake reading of 9,800 cfm and a return reading of 9,000 cfm and Stover obtained an intake reading of 9,700 cfm and a return reading of 9,000 cfm (Tr. 226).

At the end of the first day of testimony, Consol's counsel notified Pittman and his counsel that he would ask Pittman questions the next day about some fireboss entries showing that Pittman himself had reported on several occasions intake readings which were lower than the return readings (Tr. 233). The next day, as promised, Consol's counsel introduced, as Exhibits I through F, preshift reports showing that Pittman and other mine examiners had obtained intake readings which were up to 2,500 cfm lower at the intake than they were at the return (Tr. 241-248). Five of the preshift reports (Exhs. I, K, L, M, and N) show that Pittman reported larger return air measurements than intake measurements in the first 2 weeks of October 1981.

Pittman conceded that he had testified on the previous day that all readings showing an equal or greater air measurement for the return than for the intake were falsifications, but he said that his testimony to that effect applied only to the conditions which existed in the 3B Section on Friday and

Monday, January 15 and 18, 1982, prior to the time that permanent stoppings were constructed (Tr. 249). Pittman then said that he could explain why his return readings in October 1981 were greater than the intake. His explanation was that in October 1981 the 3B Section was being developed in the area which is shown in red on Exhibit 21 in this proceeding. At that time, according to Pittman, the air coming into the 3B Section was going so completely to some punchouts at the outcrop of the mine, that it was necessary to place stoppings over the punchouts to restrict the flow of air through the punchouts so that air could be directed to the working faces (Tr. 251). Pittman further explained that in October 1981 there were permanent stoppings between the Nos. 4 and 5 entries which forced air to go to the working faces and pass along the last open crosscut so as to bring about a higher reading at the return than at the intake of the entries then being mined (Tr. 261-270). Pittman also claimed that in October 1981 they had three sets of check curtains across the belt and that they were working about six or seven breaks away from the belt so that the air was forced along the permanent stoppings to the working faces (Tr. 274-275).

Pittman's efforts to explain why he was properly reporting truthful return readings higher than the intake readings in October 1981 but that McConnell had to be reporting false readings in 1982 if he reported return readings equal to or greater than the intake readings were not convincing because one of his own crew members (Simms) testified that even after the permanent stoppings requested by Pittman were constructed in the 3B Section, air continued to leak down the belt and track entry so that the section foremen had to maintain a constant vigil over check curtains inby the tailpiece to prevent air from leaking down the belt entry instead of going to the working faces (Tr. 1017). On January 18, 1982, when Blankenship, the mine superintendent, caught Pittman producing coal without adequate ventilation, it was necessary only to rehang or adjust two check curtains near the tailpiece to provide an adequate volume of air to the working section, as I have explained on page 19, supra. It is obvious that Pittman was continually failing to assure that the check curtains inby the tailpiece were properly hung during his shift, whereas McConnell was maintaining proper check curtains near the tailpiece when he was supervising the 3B Section. That difference between the Pittman's and McConnell's method of operating the section would account for the fact that McConnell obtained adequate ventilation for operating the 3B Section, whereas Pittman could not do so. The foregoing assertion is supported by the fact that Pittman's own explanation as to why accurate return readings larger than intake readings could be obtained in October 1981, but could not be obtained on January 15 and 18, 1982, included an assertion that the check curtains at the belt had to be maintained in 1981 to direct air to the working faces (Tr. 272).

Seven witnesses called by Consol disagreed with Pittman's claim (Tr. 224) that it would have been impossible on January 15, 1982, for McConnell to have obtained a return air reading which was the same as the intake reading (Tr. 1340-1341; 1409; 1436-1437; 1598-1599; 1652; 1956; 1997). Blankenship, for example, testified that he could see no reason why air which was leaking out by the Nos. 2 and 3 check curtains and going down the belt entry could not also leak back across and get into the return in sufficient quantity to affect the air reading obtained in the return entry (Tr. 1997).

Based on the discussion above, I find that Pittman failed to prove that there is no logical explanation for the fact that McConnell obtained a reading in the return on January 15, 1982, which was the same as the reading he reported for the intake entry (Exh. 18, p. 55).

Pittman's Work Record Prior to his Discharge on January 18, 1982

Performance Ratings

Pittman's initial brief (pp. 3-4) refers to some of Pittman's early performance ratings after he became a section foreman for the purpose of showing that Pittman was considered by Consol's management to be an outstanding section foreman. The review of Pittman's work record, hereinafter given, shows that Consol's management, in the beginning, expected Pittman to develop into a competent and dependable section foreman, but his performance of his position as section foreman deteriorated for about 2 years preceding his discharge on January 18, 1982.

Pittman began working for Consol on May 15, 1976, as an assistant section foreman (Tr. 24). He was promoted to section foreman in August 1976 (Tr. 27; 31). His first performance rating was given on February 11, 1977, and ranked him as 16th in ability in a list of 20 section foremen. The rating also considered his ability in such factors as quality of work, quantity of work, job knowledge, cooperation, dependability, relations with employees, attitude, attendance, leadership, and initiative. Five adjectival ratings are used to describe an employee's ability with respect to the aforesaid factors. They are outstanding, above average, average, below average, and marginal. Pittman was given an average rating as to all factors except "quality of work" as to which he was rated as below average. The rater's comments were: "Production oriented--his relationship with his employees prevents him from getting dead work done. May be promotable in time. Still learning his present job" (Exh. 10; Tr. 33). Pittman testified that he did not understand why the rater mentioned his inability to get "dead work" done because he says he was as able to get dead work done as any other section foreman (Tr. 35). He also said that no supervisor had mentioned to him anything about his inability to get dead work done (Tr. 36).

Pittman's second performance rating is dated January 16, 1978. It rates him as 13th from the top in a list of 20 section foremen and rates him as average in all categories of the factors given above. The rater's comments were that Pittman "[i]s improving; has good attitude. Needs more experience; tries hard" [Punctuation added.] (Exh. 11). Pittman's third performance rating is dated January 18, 1978. It rates him as 12th in a list of 24 section foremen and gives him a rating of above average in quantity of work, job knowledge, and relations with employees, below average in dependability and initiative, and average in all other factors. The rater's comments were that Pittman "is a young, competent foreman. He seems to know his job and his employees well. He can be hard headed at times, sometimes needing guidance and motivation" (Exh. 12; Tr. 38).

Pittman's fourth performance rating is dated January 29, 1979, and rates him as eighth in a list of 17 section foremen. He is given an above average rating in the factors of quantity of work, cooperation, dependability, and relations with employees and average in all other factors. The rater's comments were that Pittman "is a good section foreman. He gets along well with his people and creates no problems as an employee" (Exh. 13; Tr. 40). Pittman's fifth performance rating is dated January 22, 1980. Apparently Consol discontinued its practice of giving its section foremen an overall ranking because the rating consists of only one sheet evaluating the employees in the factors given above in one of the five adjectival ratings also given above. The fifth rating gives Pittman an above average rating in the factors of quality of work, quantity of work, cooperation, dependability, relations with employees, and initiative, and average in the other four factors. The only comment made by the rater was that Pittman is a "very good section foreman" (Exh. 14; Tr. 41).

Pittman's sixth performance rating is dated February 1981 and rates Pittman as above average in quantity of work, job knowledge, cooperation, dependability, leadership, and average in all other factors. The rater's comments are that "Mr. Pittman is a young foreman who doesn't always give a maximum effort. Sometimes it seems as if he is afraid of making people mad by telling them what to do. He is very mild mannered" (Exh. 15; Tr. 42). Pittman's last performance rating was written only 15 days before his discharge. It is dated January 3, 1982, and rates him as above average in job knowledge, below average in attitude, attendance, and leadership, and average in all other factors. Also, whereas in all other performance ratings, Pittman had been rated as average in promotability, he is rated as poor in promotability in the sixth performance rating. The rater's comments are that "Mr. Pittman could be a very good foreman, but lacks initiative to improve on job performance. His attendance has to be watched very close" (Exh. 15A; Tr. 44).

Pittman's seventh and final performance rating is dated January 29, 1982, and was written after he had been discharged on January 18, 1982. It is written on an evaluation form which seems to be designed for use in making a final evaluation of an employee who has been discharged. The form provides for an overall rating of above average, average, or poor. Pittman was given an overall rating of poor. The form rates employees as either satisfactory or unsatisfactory. Pittman was given a satisfactory rating as to being safety minded and having ability to learn and was given an unsatisfactory as to all other factors hereinbefore discussed. He was given a rating as to initiative of below average, and the rater checked a block showing that he would not rehire Pittman. The rater's comments are: "[h]ad problems getting him to work regular. Suspended 5 days for violation of roof control plan and discharged for ventilation problems" (Exh. 16; Tr. 46).

My detailed review of Pittman's performance ratings shows that when he began working as a section foreman, he was considered to have a potential for becoming an outstanding employee, but it is quite obvious that the supervisory personnel at the Rowland No. 3 Mine became increasingly critical of Pittman's abilities as a section foreman. Pittman reached the zenith of his performance when he was rated in January 1980. The next two ratings for 1981 and 1982 show that his supervisors were becoming doubtful of his abilities to function as a competent section foreman. I shall hereinafter review various events which occurred during the 5 years and 8 months of his tenure as a section foreman. Those occurrences show that Pittman was less than a model employee and provide enlightenment for the fact that his performance ratings became increasingly critical of his abilities during the last 2 years of his employment.

Pay Increases

Pittman's initial brief (p. 5) states that Consol gave Pittman pay increases each year that he worked for Consol. It is a fact, however, that Pittman's merit increases were slightly less than the average increase received by the other section foremen for the last 2 years of his employment (Exh. AA). Therefore, Pittman's merit increases do seem to have been slightly less than the average merit increase during the 2 years when his performance ratings indicated that his superiors were becoming more critical of his abilities than they had been during the first 3 years of his employment. Since all of Pittman's performance ratings had classified him as average in promotability up to the one he received 15 days prior to his discharge, it is not surprising that he received the same or nearly the same average increase which the other section foremen were getting. The fact that Pittman was receiving average salary increases each year can be used as evidence to show that Pittman was not discriminated against during the last 2 years

of his employment as much as it can be used by Pittman in his brief for the purpose of arguing that Pittman was a section foreman devoid of fault right up to the day of his discharge.

Excessive Preworking Sessions Concluded with Prayer

The chief electrician once complained to Thomas, the mine foreman, that Pittman had held a prayer meeting on his section before going to work which lasted for 1-1/2 hours (Tr. 1781). Pittman agreed that he had held conferences with his crew before work, but he said the meetings he had were the safety meetings which were required to be held every Monday and that his prayers did not last for more than 1 or 2 minutes. Pittman also said that he was warned not to have prayer before work on at least two occasions by Thomas, but he said that the men asked him why he had stopped having prayer before work and that it also bothered his conscience not to have the prayers, so he resumed having prayers before work on Mondays after he had held the required safety meetings despite Thomas's instructions to cease having prayers (Tr. 122; 191; 399-400).

Pittman's crew members testified that Pittman's prayers did not last longer than 3 minutes and that they either did not object to the prayers or wanted him to keep having prayer (Tr. 479; 1153; 1235; 2230). Blankenship, the mine superintendent, testified that he instructed Thomas to advise Pittman that a short prayer was permissible but that a long prayer meeting was forbidden. So far as Blankenship knew, Pittman had stopped having long prayer meetings (Tr. 1981-1982). Inasmuch as Blankenship is the supervisor who discharged Pittman, I find that Pittman's discharge was in no way motivated by the fact that Pittman was having a brief prayer on Monday mornings after he had finished holding the required safety meetings. That conclusion is supported by the fact that Blankenship believed that Pittman had stopped having objectionable long prayer meetings prior to the time of his discharge. It hardly needs to be pointed out, but there is nothing in section 105(c)(1) of the Act which makes prayer a protected activity.

Pittman's Insistence upon Doing Classified Work and Riding with a UMWA Employee

Thomas also objected to the fact that Pittman performed manual labor, or classified work, which is normally done by UMWA employees (Tr. 428). Pittman testified that he worked right along with his crew and that they did not object to his doing so (Tr. 398). Jerry Toney, the belt foreman, stated that he had had grievances filed against him when he performed work normally done by UMWA employees (Tr. 1736-1737). Here, again, Pittman was consistently doing work which was contrary to his instructions and there is nothing in section 105(c)(1) which protects his performance of manual labor. His doing

manual labor in violation of the mine foreman's instructions may be one of the reasons that Blankenship, the mine superintendent, and Thomas became less pleased with his work during the last 2 years of his employment.

Thomas testified that Pittman rode to work with a UMWA employee and that he asked Pittman not to do so because he felt that Pittman might disseminate to the UMWA crewman (Simms) policy matters which were discussed in meetings attended only by managerial employees and that he felt that it was preferable for the section foremen to avoid fraternizing with UMWA employees (Tr. 1781-1782). Pittman ignored Thomas's instructions not to ride with the UMWA employee and he continued to ride with him up to the time of his discharge (Tr. 396; 1044). There is nothing in the record to show that Pittman's continued riding to work with a UMWA employee contributed to Pittman's discharge and, even if there were a connection between the discharge and Pittman's riding with a UMWA employee, there is nothing in section 105(c)(1) which makes the choice of a person's method of getting to work a protected activity under the Act.

Pittman's Foot Injury and Consol's Report of No Lost Time

Pittman says that in October 1981 his roof-bolting crew had a mechanical problem with the roof-bolting machine. He tried to help them repair the machine which was, he agrees, an instance when he was doing UMWA work instead of supervisory work. The defective component of the roof bolter fell on Pittman's foot so that he had to have it examined by a physician (Tr. 201). Blankenship testified that he personally looked at Pittman's foot after it was injured and that he could see no discoloration or break in the skin and no swelling (Tr. 2051). Blankenship said that Pittman had requested a week off without pay so that he could do some work on his house and that the request had been denied (Tr. 2050). Blankenship felt that Pittman had feigned the injury in order to take a week off anyway and he insisted that Pittman report to work the next day after the injury. Pittman's foot was eventually placed in a walking cast and Pittman reported to work nearly every day during his recuperation from the accident, but for a few weeks he did such work as calibrate equipment and collect materials needed for a re-training course (Tr. 202-203; 2027).

Pittman's reply brief (pp. 1-2) argues that Blankenship was as guilty of falsifying Consol's report of no lost working days as a result of Pittman's foot injury as Pittman was in signing the fireboss book when it contained incorrect air measurements. Exhibit 29 is a report of personal injury dated October 27, 1981. It indicates that Pittman's foot was injured on October 20, 1981, and shows that Pittman returned to his permanent job in full capacity although Consol's attorney asked questions at the hearing indicating that Consol considered Pittman's work for a short time after the accident to be only

"light duty work" (Tr. 202). The statement given by Pittman to MSHA's investigator indicates that Pittman was required to do work in the mine office and check on spare parts, etc., while his foot was in a cast and the statement claims that Thomas, the mine foreman, required Pittman to return underground and resume his duties as section foreman on November 23, 1981, even though the doctor had recommended that he not return to active duty prior to November 30, 1981 (Exh. F, pp. 7-10). The physician's report of Pittman's injury shows "localized swelling and tenderness" and states that "X-rays show no definite evidence of fracture" (Exh. G). The doctor's report also reveals that a walking cast was placed on Pittman's foot from November 2 to November 20, 1981, and indicates that the doctor did not intend to refer him back to work until November 30, 1981 (Exh. G).

As to the claim in Pittman's reply brief (pp. 1-2) that Blankenship falsified the report of injury (Exh. 29) just to keep from reporting lost time as a result of an injury--a report which might have impaired Consol's good safety record at the No. 3 Mine--it can hardly be said that Blankenship misrepresented the facts as he believed them to be with respect to Pittman's foot injury because Blankenship sincerely believed that Pittman was feigning the injury and insisted that Pittman report for work the next day after the accident despite the fact that Pittman's foot was eventually placed in a walking cast. Blankenship also defended his reporting that Pittman returned to his permanent job in full capacity by claiming that Consol did not have anyone for assignment to preparing materials for retraining classes and that if he had not asked Pittman to do that type of work, he would have had to ask a person doing some other permanent job to do that work on an interim basis (Tr. 2027).

Pittman's claim of discrimination with respect to his foot injury is a very appealing one because the physician's reports do show that Pittman's foot was placed in a walking cast and that the physician recommended that Pittman not work for several weeks. Despite the physician's instructions, Blankenship agrees that he insisted that Pittman come to work throughout the recuperative period. In discrimination cases, it is generally necessary to prove that an employee has been a victim of discriminatory treatment by inferences to be drawn from actions which appear to have no real basis for their occurrence apart from some unexplained prejudice which can be attributed to nothing other than an unlawful animus toward an employee because of actions which are protected under the Act. In this proceeding, however, Consol's animus toward Pittman has been explained by Consol's evidence showing that Pittman continued to act in ways which displeased Consol's management. Pittman continued to ride to work with a UMWA employee; Pittman continued to perform manual labor instead of adhering to his

supervisory duties; and Pittman, as will hereinafter be explained, did other acts which caused management to doubt his ability to do his job conscientiously and safely.

While I personally might not have considered some of Pittman's acts as being censurable, I can at least understand why Consol's management issued the instructions he was given. None of Pittman's censurable conduct consists of activities which are protected under section 105(c)(1) of the Act. The record in this proceeding does not show that Pittman has ever engaged in any safety-related acts other than his having called Thomas, the mine foreman, on January 15 and 18, 1982, for the purpose of advising Thomas that he had no air on his section. As has been demonstrated above, Pittman's claims that he had no air on his section was the result of his own failure to erect curtains inby the tailpiece to keep the air which was undeniably on the section from leaking down the belt and track entry instead of being directed to the working faces. Therefore, management's animus toward Pittman, if any, cannot be shown to relate to activities which are protected under the Act and it is not possible for me to find that management's alleged animus toward him was the result of anything other than his insistence on doing unprotected acts his way instead of the way management wanted them done.

Pittman's Taking of a Day Off to Attend Church Service

On one occasion, Thomas, the mine foreman, was absent when Pittman wanted to request a day off to attend a special church service. He or his shift foreman asked Larry Hull, the superintendent who preceded Blankenship in that position, for the day off. Hull testified that he denied the request because of a shortage of personnel (Tr. 1461), whereas Pittman claims that Hull granted the request (Tr. 196). In any event, Pittman did not report for work on the day he had requested to be absent. Pittman claims that Thomas became upset when Pittman failed to show up for work and called Pittman at home on Saturday to order him to report to Hull's office on Monday before going into the mine because he might be fired for taking the day off (Exh. F, p. 4).

The shift foreman, Rudy Toney, testified that Pittman had asked for a day off and that he had checked with Hull about the request and Hull had denied the request, but Pittman took the day off anyway. Toney stated that Pittman then called him on Saturday and asked him to intercede with Hull because Pittman was afraid that he might be fired for having taken the day off. Toney then called Hull and asked Hull if he planned to discharge Pittman for taking the day off and Hull stated that he was going to discuss the matter with Thomas and decide the question on Monday (Tr. 1302-1303). Thomas testified that he asked Hull not to discharge Pittman because he felt that discharge would have been excessively harsh in that instance (Tr. 1780).

The credibility of the witnesses here should be decided in Consol's favor. Hull testified that when they were discussing Pittman's having taken the day off on Monday Pittman explained that he had been working on his house and that when his wife reminded him that it was time to go to work, he just decided that he would not go to work (Tr. 1462). It is doubtful that Hull, if he were fabricating a story, would conjure up a conversation with Pittman's wife if that had not been mentioned by Pittman himself in an effort to explain his taking of a day off after his request to be absent had been denied.

Pittman's claim that Thomas called him on Saturday to tell him he would probably be fired is not convincing because Thomas was consulted about the matter only after Rudy Toney had called Hull in response to Pittman's phone call indicating that he was expecting to be discharged for taking the day off. It is unlikely that Thomas would have called Pittman on Saturday to warn him he might be discharged on Monday and then recommend to Hull that Pittman not be discharged, especially since Toney had testified that Hull had indicated to him that his decision with respect to discharging Pittman would be made after he had consulted with Thomas on the following Monday. Finally, if Hull had actually granted Pittman's request for a day off, there would have been no reason for him to deny that he had ever granted that request or tell Toney that he would have to consult with Thomas before determining whether Pittman should be discharged for taking a day off from work.

The outcome of Pittman's having taken the day off indicates that Consol's management was at least reasonable on one occasion in doing no more than warn him that no further taking of days off without permission would be tolerated.

Pittman's Roof-Control Violations

Blankenship testified that Pittman had failed to follow the roof-control plan on at least three occasions. The first time occurred when Pittman was near an outcrop in the mine. When outcrops are being approached, the roof-control plan requires that additional support be set in the form of one row of posts and establishment of a 16-foot roadway. Pittman had set the required row of posts but he had set them against the rib and the roadway was 18 to 19 feet wide. The row of posts is needed to warn the miners as to whether the road is becoming unstable and if the posts are set against the rib, as Pittman had set them, they do not perform the function of providing a warning of unstable roof when cutting toward an outcrop (Tr. 1982).

Pittman's second violation of the roof-control plan occurred when the continuous-mining machine was covered up by a massive roof fall. When Blankenship inspected the site of

the roof fall, he found that a large solid rock had fallen on the left side of the continuous miner in such a way that he could see along the right side of the miner almost to the cutting head and Blankenship did not find any timbers at all along the side of the miner, whereas the roof-control plan requires the setting of a double row of timbers along both sides of the miner. Additionally, the roadway outby the miner is required to be no more than 14 feet wide, but Pittman's roadway timbers were more than 14 feet apart. Blankenship gave Pittman a verbal warning at that time (Tr. 1964-1965).

Blankenship testified that occurrence of several roof falls on top of the continuous miners caused him to require that a crib be set on each side of the miner before a pushout was made. About a month after the continuous miner on Pittman's section had been covered up by a roof fall, Blankenship inspected Pittman's section and found that he had completed a pushout without setting a crib on either side of the miner. Also Pittman had set the timbers in the roadway 21 feet apart, instead of 14 feet apart, as required by the roof-control plan. Blankenship suspended Pittman for 5 days for the third violation of the roof-control plan (Tr. 1966-1967).

Pittman does not deny that he failed to erect one of the cribs which Blankenship had instructed him to set, but he and the operator of the continuous miner tried to excuse their failure to follow the roof-control plan by arguing that they did not have enough crib blocks on the section to construct the second crib and they claim that the roof was so unstable that there was more danger in the roof falling if they delayed the pushout until crib blocks could be obtained for building the crib than if they just went ahead with completion of the pushout with the cluster of timbers which they had used in lieu of the crib (Tr. 48-51; 190-191; 392-393; 2204-2205). Pittman also complains that Blankenship would not talk to his crew who would have supported his contentions with respect to the lack of crib blocks and his use of a cluster of timbers in lieu of a crib (Tr. 52). Blankenship stated that he did not need to interview Pittman's crew when the physical evidence at the scene of the roof-control violations provided him with irrefutable proof that the violations had occurred (Tr. 1967).

There is clearly a lack of merit to Pittman's excuses in this instance. There was no obvious reason or explanation for Pittman's failure to have on the section the materials required to support the roof (Tr. 2226-2227). Pittman has on his section at all times a scoop, or unitrak, as well as a scoop operator, to haul supplies from the track unloading point to the working section (Tr. 982; 989; 997). Consol has a two-man crew whose sole function consists of hauling supplies to the three working sections in the mine (Tr. 844-845;

1697). Pittman was negligent in failing to have an adequate supply of crib blocks on his section. When it is considered that roof falls still account for a large percentage of the fatal accidents which occur in underground coal mines every year, Blankenship was certainly justified in refusing to accept Pittman's feeble alibis in this instance.

Pittman's Claim that he was Ordered to Produce Coal without Adequate Ventilation

Pittman's case would have been strengthened if he had had any corroboration at all to support his claim that Thomas, the mine foreman, and Jerry Toney, the belt foreman who was in charge of constructing permanent stoppings on Pittman's section, ordered him to produce coal with knowledge that Pittman did not have adequate ventilation. The two miners (Kincaid and Moore) who were on the phone and actually overheard both Pittman and Thomas talking only heard Pittman say that he did not have adequate ventilation (Tr. 134-135; 806). They also heard Thomas advise Pittman about his need to recheck his curtains, but neither of them heard Thomas tell Pittman to go ahead and produce coal without adequate ventilation until permanent stoppings could be constructed (Tr. 137; 811).

Although Randy Workman did testify that he heard Toney order Pittman to produce coal while the permanent stoppings were being constructed (Tr. 1165), his credibility was completely destroyed when it was shown that he was absent from work on the day during which he had vividly recalled what had happened on Pittman's section (Tr. 1177-1179). At least one miner (Harvey) on Pittman's section claims to have overheard Pittman talking on the phone and heard Pittman tell Thomas that he lacked sufficient air, but he only heard Pittman's side of the conversation and did not know what Thomas may have said to Pittman (Tr. 1224). Moreover, his credibility was impaired by his inability to recall for certain what he had done to the ventilation system on January 18, 1982 (Tr. 1226; 1235).

Pittman contradicted himself so much about what Toney said and when he said it, that Pittman's claim that Toney ordered him to produce coal cannot be accepted as a truthful assertion. Some reasons for the aforesaid conclusion are: First, Pittman said that his crew had refused to run coal until they saw Toney come in with cinder blocks to construct stoppings, but subsequently Pittman said that he could not recall whether production had been started before or after Toney arrived on the section (Tr. 287-288). The dispatcher sheet, of course, shows that production started at 8:42 a.m. and that Toney did not arrive until 9:51 a.m. (Exh. C). Second, Pittman could not recall whether he had told Toney that he had inadequate air at the time he claims that Toney ordered him to

produce coal (Tr. 360). If Toney did not know that the section had an inadequate supply of air at the working faces, he could not possibly have ordered Pittman to produce coal with knowledge that Pittman did not have adequate ventilation at the faces. Third, Pittman stated that his complaint (Exh. Q) filed in this proceeding was incorrect to the extent that it states that Toney gave him a choice of having his men help construct permanent stoppings or run coal because his testimony in this proceeding to the effect that Toney gave him no choice but to run coal is the correct version of what happened (Tr. 301). Of course, Toney and Thomas both deny that they ever ordered Pittman to produce coal without having adequate ventilation (Tr. 1700; 1809).

The discussion above shows that a preponderance of the evidence fails to support Pittman's claim that Thomas and Toney ordered him to produce coal with knowledge that he had inadequate ventilation at the working faces.

Pittman's Lack of a Watch for Purpose of Taking Air Measurements

Pittman's credibility was rendered an additional blow when Blankenship testified that when he found the operator of the continuous-mining machine cutting coal on Pittman's section in dust so thick that Blankenship could hardly detect the light on the machine, he stated that he asked Pittman to take an air reading and Pittman replied that he could not take a reading because he did not have a watch (Tr. 2006-2007). Thomas, who was not present when Pittman told Blankenship that he lacked a watch for taking an air reading, subsequently asked Pittman to take an air reading and Pittman also told Thomas that he could not take an air reading because of a lack of a watch (Tr. 1899).

After production had been stopped and air had been restored by installing curtains in the Nos. 2 and 3 entries in by the belt tailpiece, Blankenship asked Pittman to take an air reading and he was able to do so. Only about 15 minutes had elapsed between the two requests and Blankenship explained Pittman's ability to take an air reading after he had made the second request, as compared with the first, by stating that he was not surprised by Pittman's ability to comply with the second request that he take an air reading because he had not believed Pittman when he told him in the first instance that he lacked a watch for taking an air reading (Tr. 2010).

Pittman claimed that he did not recall ever having told Blankenship that he had no watch to take an air reading and that even if he did not have a watch, he could have borrowed a watch from one of the miners (Tr. 305-306). Failure to have a watch could only have meant that Pittman could not have taken an air reading at any time during the shift. Since Pittman had claimed that he did not have even enough air to turn

his anemometer, it is possible that he could have worked for the entire shift without bothering to ask any of his men to lend him a watch. Pittman's credibility is further eroded by the lack-of-a-watch episode because if he really did not have a watch, then he never did make a conscientious effort to determine how much air he had at the main intake entry and follow through to determine exactly where he was losing his air, as Blankenship did after stopping production, or he really did have a watch and just gave his lack of one as an excuse to keep from having to admit to Blankenship that a proper test for air would have shown that he lacked adequate ventilation at the working faces.

The Alleged Conspiracy

Pittman's initial (p. 36) and reply (pp. 6-15) briefs claim that management set Pittman up for discharge by asking him to produce coal without adequate ventilation so that he could be caught operating in violation of the law and thereby provide management with an excuse for discharging him. That claim will not survive close scrutiny for a number of reasons. First, if Thomas, the mine foreman, had deliberately set Pittman up for discharge, it would appear that the ideal time to have done so would have been on Friday, January 15, 1982, when Pittman first ran his section with inadequate ventilation. Thomas had not at that time had the permanent stoppings constructed and, according to Pittman, knew that Pittman was operating without adequate ventilation. Thomas had planned to have cinder blocks taken to Pittman's 3B Section on Saturday and had to know that there was a strong possibility that permanent stoppings might become constructed and provide Pittman with an adequate air velocity for the 3B Section by Monday. Thomas knew from examining the fireboss book on Monday that the mine examiners were getting readings of 9,000 cfm or more at the last open break and would have had no reason to expect that Pittman would be operating his section on Monday with inadequate ventilation. Therefore, the ideal time to have caught Pittman producing coal with inadequate ventilation would have been on Friday.

The second defect in Pittman's conspiracy theory is that on Monday morning Thomas did send in both cinder blocks and the crew of miners needed to construct stoppings. Thomas was advised on Monday morning that Blankenship was going to visit the mine on Monday afternoon. Thomas advised Pittman of that fact about noon. Thomas knew that Pittman would be expecting both him and Blankenship on Monday afternoon. If Thomas had intended to set Pittman up for discharge, it is highly unlikely that he would have provided Pittman with advance warning that he was coming in with the superintendent to check the conditions on Pittman's section.

The third defect in Pittman's conspiracy theory is that Pittman himself testified that he was notified about noon that Blankenship and Thomas would be coming to his section (Tr. 362). The record provides no satisfactory explanation of why Pittman would have failed to take action to make sure that he had adequate ventilation before Blankenship and Thomas arrived. The least that Pittman would have been expected to do upon receiving the advance warning about the inspection would have been to remind Thomas that he was producing coal without adequate ventilation as Thomas had asked him to do and inquire about the wisdom of his continuing to produce coal without adequate ventilation at a time when Blankenship would be visiting the section. Pittman claims that he did not close down in order to obtain adequate ventilation because he already knew that both Blankenship and Thomas had a low opinion of his abilities as section foreman and that they would have been as likely to fire him for shutting down production long enough to establish ventilation as they would for his continuing to produce coal with inadequate ventilation (Tr. 418-419). That contention lacks merit because, according to Pittman's claim, Thomas had ordered him to produce coal with inadequate ventilation and there is no reason for him to have been reticent about reminding Thomas that he was producing coal without adequate ventilation and asking Thomas if he could stop production until the permanent stoppings had been completed, especially in view of the fact that construction of the permanent stoppings was nearing completion by the time Pittman received advance notice of Blankenship's and Thomas's arrival on the section.

The fourth defect in Pittman's conspiracy contention is that effectuating the conspiracy would have had to be dependent upon Thomas's having the cooperation of several persons who did not work on Pittman's shift. The reason for the aforesaid statement is that all persons who examined the 3B Section on Friday and Monday obtained an air reading of 9,000 cubic feet or more at the last open break. Those mine examiners were McConnell, the section foreman who was in charge of the crew which produced coal in Pittman's 3B Section on the 4 p.m.-to-midnight shift on Friday, and the UMWA firebosses (Stover and Wriston) who examined the mine on Saturday, Sunday, and Monday. In order for the alleged conspiracy to be carried out, the cooperation of McConnell, Stover, and Wriston would have had to have been obtained because Pittman claims that those individuals were falsifying the air measurements of at least 9,000 cfm which they were entering in the fireboss book (Exh. 18, pp. 53-63). If the cooperation of those mine examiners had not been obtained, their readings would have been less than 9,000 cfm, according to Pittman, and would have corroborated Pittman's claim that no one could have obtained adequate air readings prior to the time that the permanent stoppings were constructed. It is highly unlikely that McConnell's, Stover's,

and Wriston's cooperation in making false entries in the fire-boss book could have been obtained without at least one of them having made inconsistent statements which would have cast doubt on their credibility. Yet all three of them provided some of the most convincing statements which were made in this proceeding.

The fifth defect in Pittman's conspiracy theory may be based on the testimony of Blankenship, the mine superintendent, who testified that he did not decide to visit the Rowland No. 3 Mine until Monday morning. He said he did not think there was any merit to Pittman's conspiracy claim because Thomas knew his feelings about mine safety and health and that Thomas would never have knowingly taken him on a section producing coal with inadequate ventilation. Blankenship stated that if he had ever been convinced that Thomas and Jerry Toney had anything whatsoever to do with Pittman's having produced coal without adequate ventilation, he would have discharged all three of them (Tr. 2017; 2020).

For the reasons given above, Pittman's claim that his discharge was based on a conspiracy by Thomas to have him produce coal without adequate ventilation, so that he could be caught operating his section in violation of the law, must be rejected.

Pittman's Allegations as to Disparate Treatment

Pittman's initial brief (pp. 35; 39-40) argues that his discharge showed disparate treatment because discipline at the No. 3 Mine was "uneven, whimsical, and discriminatory" and that no one else had been discharged for admitting that he had produced coal with inadequate ventilation. Consol's counsel submitted extensive evidence showing that Blankenship, the superintendent, did not tolerate safety violations, absenteeism, or irresponsible conduct (Tr. 1463; 1961). Blankenship, for example, suspended Bill Blevins, a section foreman, for 5 days for irregular work and discharged him for ventilation violations and failing to establish centerlines on his section (Tr. 949; 1325; 1342; 1466; 1793; 1968). Blevins was discharged just 3-1/2 months before Pittman's termination occurred (Tr. 815; 1326; 1795; 1969). The day of Blevins' discharge, Thomas referred to Blevins' discharge and warned Pittman that he would receive the same treatment if his performance did not improve (Tr. 299-300; 1794).

Blankenship and Thomas provided other examples of persons who have been disciplined at the No. 3 Mine. Keith Hartzog, a maintenance foreman, was given a 5-day suspension for a safety violation (Tr. 1797; 1969). Allen Powers, Jr., a section foreman, was given a 5-day suspension for a safety violation (Tr. 1970; 1797). Sidney Federoff was discharged for coming to work

intoxicated (Tr. 1970). Mark Fink was required to forfeit a 1-week vacation because of absenteeism and was discharged for lying about the taking of an emergency medical technician test and for having a bad attitude in general (Tr. 1971-1972). Elbert Young, a UMW roof-bolting machine operator, was suspended for 5 days over a safety violation (Tr. 1973-1974; 1798-1799). Alexander Williams, Oakley Gore, and Jerry Williams, UMW employees, were all suspended for 17 or 18 days for carrying smoking materials into the mine (Tr. 1974).

Additionally, it should be noted that Blankenship was going to discipline Pittman's continuous-mining machine crew on January 18, 1982, the day of Pittman's discharge, when he caught them cutting coal without adequate ventilation, but they were saved from disciplinary action because they told Blankenship that they had complained to Pittman about the lack of ventilation and he had asked them to operate the miner despite the lack of sufficient ventilation (Tr. 233; 1135; 2002). Although Blankenship did not discipline the miner crew at that time, he warned them that if he caught them in a similar situation at a subsequent time, they would be disciplined (Tr. 1137; 2001).

Pittman tried to show that two other section foremen, Delp and Grabosky, were not disciplined despite the fact that citations were issued by an MSHA inspector when he caught them operating without the required volume of air at the working face (Exhs. 24, 25 & 27). Both Blankenship and Thomas defended the failure to discharge Delp and Grabosky by pointing out that each violation has to be evaluated on its own merits and they correctly noted that neither Delp or Grabosky had run their sections for a long period of time, as Pittman had, with knowledge that there was inadequate air on the section (Tr. 1938; 2000). It was also noted by Thomas that a different response was called for based upon an employee's past record. There was no showing that Delp or Grabosky had records comparable to Pittman's poor record. The only section foreman with a record comparable to Pittman's was Blevins and he, like Pittman, had been warned of possible discharge for prior offenses and he, like Pittman, had been suspended for 5 days before he was discharged. Blankenship discussed Pittman's prior record with him on the day of his discharge and his prior record was a factor in Blankenship's decision to discharge him (Tr. 188; 1902-1903; 2013).

The preponderance of the evidence, therefore, shows that Pittman did not receive disparate treatment when he was discharged for producing coal without adequate ventilation.

Pittman's Allegations Regarding Thomas, the Mine Foreman

Large parts of Pittman's initial brief (pp. 19-30) and reply brief (pp. 6-15) consist of an attempt to show that Thomas, the mine foreman, was incompetent, lacked credibility, and refused to defend Pittman when Blankenship, the mine superintendent, caught Pittman operating his section without adequate ventilation because Thomas knew he would have been discharged along with Pittman if he had admitted that he knew Pittman was operating the 3B Section without adequate ventilation. I have already shown under the 17 headings hereinbefore given that Pittman failed to prove a prima facie case of discrimination because, while he did show that he had engaged in the protected activity of reporting to Thomas that he lacked an adequate velocity of air on his section, he failed to prove that his discharge was in any way motivated by the fact that he had reported inadequate ventilation and had asked Thomas to send cinder blocks to the section for construction of permanent stoppings. Therefore, I do not feel that I am obligated to enter upon an extended discussion of Thomas's alleged shortcomings because, even if Thomas were as poor a foreman as Pittman's briefs contend he was, the preponderance of the evidence would still support a finding that Pittman failed to prove that his discharge was motivated by Pittman's protected activity of having reported to Thomas on January 15 and 18, 1982, that he did not have adequate ventilation on his 3B Section. Nevertheless, the review of the evidence, hereinafter given, shows that Thomas was not the incompetent foreman which Pittman's brief claims he was.

Thomas's Illness

It is a fact that Thomas was in poor health in 1981 and 1982, that he had undergone a triple heart bypass operation shortly after Pittman's discharge on January 18, 1982, that he had been on an extended period of sick leave up to the time of the hearing in this proceeding, and that he had decided to retire, effective June 1, 1983 (Tr. 1776-1777). It is also true that he may have relied extensively on Jerry Toney, the belt foreman, for obtaining detailed information about the conditions in the mine during 1981 and 1982 (Tr. 1693; 1751; 1907). It is likewise true that Jerry Toney was made acting mine foreman in April 1982 when Thomas was forced to take extended sick leave for heart surgery (Tr. 1693). Pittman did not succeed, however, in demonstrating that Thomas never went underground to examine conditions in person. The dispatcher (Roger Toney) testified that Thomas went underground with Blankenship about once each week and that Thomas always accompanied MSHA inspectors when they made their frequent inspections of the mine (Tr. 2188; 2190).

Thomas had had 42 years of experience as a mine foreman and had worked at least 11 years for Consol (Tr. 1777-1778). As a senior employee, he would have been entitled to take an extended period of sick leave before determining whether his health would force him to retire. Therefore, I reject Pittman's claim that Consol kept Thomas on sick leave at full salary until his testimony in this proceeding had been given just to assure that his testimony would be wholly in support of Consol's position in this proceeding.

Thomas's Credibility

Thomas worked on Saturday, January 16, 1982. The next day was Sunday and the mine was idle. Both parties stipulated on the record that Thomas was not required, since the mine was idle on Sunday, to make a preshift examination on Saturday (Tr. 1430; 1887), but he did fill out a page in the fireboss book indicating that he had patrolled the 3B Section, that he had seen no violations, that he believed the air velocity was sufficient, and that he thought the section was safe to mine (Exh. 18, p. 59). Thomas explained that he did not take an air reading because he was not obligated to make a formal preshift examination before an idle shift and that he had deliberately not gone to the face areas of the 3B Section (Tr. 1915-1916). He also stated that he walked into the mine instead of riding a track vehicle, because he wanted to examine some sections of the track which might need to be repaired (Tr. 1886-1887). The walk to the 3B Section is a round-trip distance of about 1 mile and it takes less time to walk in than it does to ride because of the difference in route which can be taken by a person on foot as compared with a vehicle traveling on the track (Tr. 1919; 2229). The dispatcher who testified on Pittman's behalf did not work on Saturday when Thomas walked into the mine and therefore could not testify as to whether Thomas walked into the mine or not (Tr. 2191).

Thomas seemed to be somewhat embarrassed when cross-examined about not having made an actual air measurement even though he was not required to do so in view of the fact that the mine was idle on the succeeding shift (Exh. 18, p. 60). Nevertheless, Pittman's brief failed to demonstrate by a preponderance of the evidence that Thomas falsified his entries in the fireboss book or violated any regulations. Therefore, I disagree with Pittman that Thomas's credibility was adversely affected by his fireboss entries associated with his having "patrolled" the 3B Section on January 16, 1982.

Thomas's Alleged Production Goals and Cover-Up

Pittman's efforts to detract from his own shortcomings by emphasizing Thomas's deficiencies are not persuasive.

Pittman claims that his constant complaints of a lack of ventilation on Friday, Saturday, and Monday, January 15, 16, and 18, 1982, were a tremendous irritant to Thomas because Thomas was so anxious to maintain a record of high production from the No. 3 Mine that he could not give Pittman's complaints the attention that they deserved because precious production time would have been lost and coal output would have declined. It is further argued that since Thomas had ordered Pittman to go ahead and produce coal without adequate ventilation so as to achieve high production goals, Thomas could not run the risk of admitting to Blankenship that he knew Pittman was producing coal without adequate ventilation because such an admission might well have resulted in his own discharge as well as Pittman's.

The aforesaid arguments are not convincing for a number of reasons. First, the comments in Pittman's 1977 performance rating state that management considered Pittman to be "production oriented" (Exh. 10; Tr. 34). Since one would assume that all management personnel are production oriented, it is surprising that Pittman's supervisor would have bothered to note that Pittman was production oriented unless he had observed that Pittman had an unusual proclivity for achieving high production. Additionally, one of the shift foremen, Rudy Toney, testified that Pittman was known to be a foreman with a good production record and that he had recommended that Pittman not be fired for taking a day off without obtaining advance permission because he believed that Pittman's good production record justified his being given another chance (Tr. 1304). Since Pittman already had a reputation for achieving high rates of production, it is unlikely that Blankenship would have been unduly critical of Pittman if his production had been down a little below average because he had had to spend more time than usual on January 15 and 18, 1982, in establishing adequate ventilation on his section.

A second reason for rejecting Pittman's arguments about Thomas's obsession with production is that, even with the inadequate ventilation which undeniably existed during Pittman's entire shift on Friday, January 15, and up to about 2 p.m. on Monday, January 18, Pittman's section produced 109 shuttle cars of coal on Friday and 100 shuttle cars on Monday (Exhs. A and C; Tr. 832-833). Production of 100 shuttle cars is considered to be a normal producing day (Tr. 341; 353; 885; 1655). Yet Pittman said that it was so dusty that the roof bolters had to stop working from time to time just to allow the dust to abate and that would have retarded normal production activities (Tr. 411). As I have hereinbefore demonstrated on page 20, supra, it should not have taken Pittman more than 15 minutes to find and correct the cause of his inadequate air supply at the working faces, if he had been the competent section

foreman which he claimed to be. If Pittman had spent the short time needed to obtain the required amount of air on his section, the miners would not have had to shut equipment down from time to time just to allow the dust to abate and Pittman's production for Friday and Monday would probably have been even greater than the 109 and 100 shuttle cars, respectively, which he did achieve with inadequate ventilation.

The foregoing conclusions are supported by the fact that McConnell, the section foreman on the 4-p.m.-to-midnight shift was able to obtain a required air velocity on his shift which followed Pittman's shift (Exh. 18, p. 55). The only explanation that Pittman could give for the fact that McConnell had obtained adequate ventilation, while Pittman could not, was that McConnell had entered a false air measurement in the fireboss book because he, like Pittman, was afraid that he would be discharged if he had reported the true inadequate reading which Pittman is certain he actually obtained. I have already demonstrated under the heading of "Pittman's Falsifying of the Preshift-Onshift and Daily Report", *supra*, pages 21-24, that the preponderance of the evidence does not support Pittman's claim that everyone but Pittman was lying about the actual air readings which they were obtaining on the 3B Section.

For the reasons given above, I find that the preponderance of the evidence shows that Thomas, despite his ill health in 1982, was performing his duties as a mine foreman in a reasonably satisfactory manner and that he gave convincing explanations for the priorities he gave to the types of work which were done on Friday, Saturday, and Monday, January 15, 16, and 18, 1982. For example, since it has been shown above, pages 19-21, that temporary curtains along the pillared-out area were adequate for providing adequate ventilation on the 3B Section on both Friday and Monday, Thomas properly directed Pettry and MacDaniel (Tr. 849; 879) to go to the 3A Section and install new trailing cables on shuttle cars rather than haul cinder blocks to Pittman's 3B Section. That change in plans on Saturday was justified because defective trailing cables may result in electrocution (Tr. 1797; 1810-1811), whereas, according to the fireboss book and the testimony of at least three witnesses, the temporary stoppings already in existence in the 3B Section were providing at least 9,000 cfm of air at the last open break (Exh. 18, pp. 55-57; Tr. 1405; 1434; 1648).

Therefore, Pittman's claims that Thomas subordinated all safety regulations which might have interfered with his goal of high coal production and that Thomas's ill health made him so sensitive to Pittman's complaints about inadequate ventilation and requests for cinder-block stoppings that he wanted to discharge Pittman for having annoyed him with such safety considerations on Friday, Saturday, and Monday, must be rejected as not being supported by the preponderance of the evidence.

Cases Cited in Pittman's Reply Brief Do Not Apply to Facts in this Proceeding

Pittman's reply brief (p. 5) argues that Pittman was discharged because he had merely followed his supervisor's instructions and that the complainant in Judge Fauver's decision in Roger D. Anderson v. Itmann Coal Co., 4 FMSHRC 963 (1982), was discharged for the same reason and was ordered to be reinstated by Judge Fauver. In the Anderson case, a preshift examination had not been performed during the 8-hour period preceding Anderson's shift which began at 4 p.m. on a Sunday. An MSHA inspector wrote an unwarrantable failure order because Anderson admitted that he knew a preshift examination had not been made during the preceding shift, but that he understood that the Federal regulations and Itmann's policy required the making of only one preshift examination every 24 hours on weekends. Anderson was discharged because of his admissions to the inspector. Judge Fauver held that Anderson's replies to the inspector's questions were a protected activity under the Act and that it was a violation of section 105(c)(1) of the Act for Itmann to discharge Anderson for that protected activity.

In this proceeding, as I have shown on pages 19-26 and 35-36, supra, Pittman was discharged because he knowingly operated his section without having adequate ventilation and the preponderance of the evidence fails to support Pittman's claim that Thomas, the mine foreman, had ordered him to operate his section without having adequate ventilation. In the Anderson case, it was shown that Itmann's policy was to require only one preshift examination during each 24-hour period on weekends and Anderson was discharged for admitting that he knew that no preshift examination had been made during the preceding 8-hour period and for stating that it was Itmann's policy to require only one preshift examination during each 24-hour period. The Anderson case is inapplicable to the facts in this proceeding because Pittman failed to prove that it was Thomas's or Consol's policy to order section foremen to produce coal without adequate ventilation.

Pittman's reply brief (pp. 10 and 15) also argues that Blankenship, the mine superintendent, failed to make an adequate investigation before discharging Pittman, and that if he had made an adequate investigation, he would have found that both Thomas and Toney had ordered Pittman to produce coal without adequate ventilation and would have found it necessary to discharge them also because Pittman was merely carrying out their instructions when he operated without adequate ventilation on both Friday and Monday. Pittman states that Judge Fauver found that Itmann had not made an adequate investigation before discharging Anderson in the Anderson case, supra, and that I had made a similar finding in my decision issued

In this proceeding Blankenship, the mine superintendent, discharged Pittman after personally finding Pittman to be producing coal without adequate ventilation. He personally took the air readings showing that adequate ventilation did not exist and he personally participated in restoring ventilation within a period of 15 minutes, as I have already shown above on page 19. Moreover, Blankenship personally checked with the other section foreman, McConnell, and a shift foreman, Taylor, about their entries in the fireboss book and established that they had actually obtained air measurements as great or greater than those which he found in the fireboss book (Tr. 2006-2013). Therefore, it cannot be successfully argued in this case that Blankenship failed to make an adequate investigation before discharging Pittman. For the foregoing reasons, Pittman's reliance on the Anderson and Cline cases is misplaced and his arguments based on those cases must be rejected.

For the reasons hereinbefore given, I find that Pittman failed to prove that his protected activity of reporting inadequate ventilation on his 3B Section was in any way a motivating factor in his discharge and that Pittman also failed to prove that either the mine foreman or the belt foreman had given him an order to produce coal with knowledge that he had inadequate ventilation on his section. Inasmuch as his discharge was in no way motivated by his having participated in an activity protected under section 105(c)(1) of the Act, Pittman's complaint should be dismissed, as hereinafter ordered.

WHEREFORE, it is ordered:

The complaint filed by Kenneth D. Pittman in Docket No. WEVA 82-334-D is dismissed for failure to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 16 1984

KENNETH A. WIGGINS, : DISCRIMINATION PROCEEDING
Complainant :
 : Docket No: WEVA 82-300-D
 : HOPE CD 82-32
v. :
 : Keystone No. 1 Mine
 :
EASTERN ASSOCIATED COAL CO., :
Respondent :

DECISION GRANTING BACK PAY AND OTHER RELIEF

Appearances: William B. Talty, Esq., Talty and Carroll,
112 Central Avenue, Tazewell, Virginia,
for the Claimant
Mark C. Russell, Esq., Jackson, Kelly, Holt
and O'Farrell, P.O. Box 553, Charleston,
West Virginia, for the Respondent

Before: Judge Moore

The parties have prepared and agreed to a Final Order which disposes of all of the back pay, attorney's fees and other relief issues. I have signed the Final Order, a copy of which is attached, and directed the parties to comply therewith.

Charles C. Moore, Jr.
Charles C. Moore, Jr.,
Administrative Law Judge

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Mr. Kenneth A. Wiggins, Box 114, Maybeury, West Virginia 24861 (Certified Mail)

ATTACHMENT

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

KENNETH A. WIGGINS, :
COMPLAINANT, : DISCRIMINATION PROCEEDING
VS: : Docket No: WEVA 82-300-D
: HOPE CD 82-32
EASTERN ASSOCIATED :
COAL CORP., : Keystone No. 1 Mine
: RESPONDENT.

FINAL ORDER

This proceeding came on for the entry of this Final Order upon the hearing on the merits held May 24-25, 1983; the Decision on the Merits dated September 6, 1983; the Interim Order dated October 19, 1983; the Order of November 4, 1983, amending the aforesaid Interim Order; the hearing to determine relief held November 22, 1983; the decision granting back pay and other benefits dated December 19, 1983, and the Supplemental Order dated January 23, 1984. Upon consideration of all of which it is Adjudged and Ordered as follows:

1. The findings of fact and conclusions of law contained in the aforesaid decisions of September 6, 1983 and December 19, 1983 are hereby incorporated herein by reference, the same as if the same were fully set forth herein;

2. The complaint of the complainant made out in his charge is hereby sustained;

3. The respondent shall pay to the complainant all salary and benefits, including overtime and vacation pay, which he would have earned between March 26, 1982, the date of complainant's

discharge by respondent, until August 30, 1982, the date on which this Judge determined the complainant would have been laid off by the respondent regardless of any discrimination under the Act. The parties have stipulated that the aforesaid amount is \$19,965.00, with the addition of certain expenses incurred by the complainant which the parties have stipulated the complainant is entitled.

4. The respondent may withhold from the aforesaid sum the sum of \$3,492.00 which the parties have stipulated is the amount of unemployment insurance received by the complainant during the period commencing March 26, 1982 through August 30, 1982. The aforesaid sum withheld by the respondent is to be paid by the respondent to the West Virginia Department of Employment Security to reimburse said Department for its payment of unemployment compensation insurance to the complainant during the aforesaid period.

5. The respondent shall remove from its records any and all mention of the notice of improper action dated March 26, 1982, and given to the complainant by Jackie Jackson, and of the events of April 8, 1982 pertaining to the discharge of the complainant by the respondent. The respondent is further ordered to refrain from any reference to either of the above events in response to any inquiries made to respondent by prospective employers of complainant.

6. Respondent shall pay to counsel for the complainant the sum of \$9,000.00, which sum the parties have stipulated is a fair and reasonable award of attorney's fees, at a rate of \$75.00 per hour for 120 hours expended, and an additional sum

of \$608.23 for expenses incurred by counsel for complainant
for transcripts, travel and long-distance telephone tolls.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Inspected:

William B. Talty

William B. Talty

Counsel for Complainant

Larry W. Blalock/Charles M. Gage

Larry W. Blalock/Charles M. Gage
Jackson, Kelly, Holt & O'Farrell

Counsel for Respondent

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 17 1984

BOBBY J. HOLT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. SE 83-49-DM
: MSHA Case No. 83-33
SOUTHERN STONE COMPANY, :
Respondent :

DECISION

Appearances: Margaret Y. Brown, Esq., Auburn, Alabama, for
Complainant;
Hoyt W. Hill, Esq., Walker, Hill, Adams, Umbach,
Herndon, & Dean, Opelika, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as repairman for Respondent because of activity protected under the Federal Mine Safety and Health Act (Act). Respondent contends that he was fired for reasons unconnected with occupational safety. Pursuant to notice, the case was heard in Opelika, Alabama, on January 17 and 18, 1984. A. L. Lazemby, Jr., Dennis Lamar Lazemby, Bill Harris, Lisa Walsh Shivers, Henry Lee Peoples, Ocie Thomas Chamblee, Lawrence W. McRae, Eunice Marshall, Janette Holt, Samuel B. Holt and Bobby Holt testified on behalf of Complainant; Cary Torbert, Kenneth E. Roberson, Jack McAnally and George Cooper testified on behalf of Respondent. Both parties have filed posthearing briefs. Based upon the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Complainant has worked for Respondent Southern Stone and its predecessor, with some breaks in employment, beginning in 1969. He quit in 1974 while working in the hopper because of the absence of any effective means to prevent trucks from rolling back into the hopper and endangering the workers. He returned to work for Respondent in 1979.

Sometime in 1980, Complainant and his wife assisted a co-worker, Willie Calloway, in contacting MSHA after Calloway had been fired, allegedly for refusing to work on the roof during a rainstorm.

In approximately November, 1982, Complainant discussed with some of his co-workers the company policy concerning wearing hard toed shoes on the job. The Plant Superintendent, Mr. Cooper, had informed Complainant that hard toed shoes were required. Complainant noticed, however, that some men, including supervisors, did not always wear them. He called the Birmingham Office of MSHA and asked what the law required concerning safety shoes. The MSHA spokesman informed him that all employees except truck drivers were supposed to wear hard toed shoes.

Thereafter Cooper called Complainant into his office and asked whether Complainant called MSHA about hard toed shoes. Complainant admitted that he had. Cooper told Complainant not to call MSHA again, "that [he] worked for Southern Stone, [and not] for Mining Safety and Health." MSHA did not investigate nor did it contact Respondent regarding this call by Complainant.

On June 1, 1980, Complainant broke his right hand in a fight unconnected with his work. He underwent three operations on the hand and missed considerable time from work. On one occasion he was "written up" by Cooper for taking time off to see a doctor. When he heard that Cooper threatened to fire him, he saw a lawyer concerning his job rights.

On May 4, 1981, Complainant suffered an occupational injury when a chute door fell on him. He continued on the job the remainder of the shift. The next day he was examined by a physician at a hospital emergency room, and stayed off work for one shift. After he returned, Cooper asked him to have the record changed so that the injury would not be shown as coming under Workers' Compensation. In return, Complainant was to receive "pay in hours." Subsequently Complainant filed a Workers' Compensation claim which is still pending.

On September 3, 1982, Complainant injured his finger while loading scrap at work. The resultant medical bills and lost time were paid under Workers' Compensation.

Complainant and his wife both complained to Mr. Cooper about employees "riding the clock," that is being clocked in, but not being at work. After the complaints, the practice "sort of slacked off." Complainant also testified that at some unspecified time, some employees engaged in drinking, horseplay, stealing and gambling on the job. He stated that the foreman participated in these activities.

In the latter part of 1982, Respondent was negotiating with a firm in Southern Alabama to supply it with a large order of construction stone. In an effort to cut delivery costs, it requested the County Commissioners of Lee and Macon counties to designate the route from Respondent's Plant as a truck route, thus reducing the haulage distance to the customer. The requests were granted, and the contract entered into. Certain residents of the two counties, whose property abutted the highway, protested the decision and sought a reversal of it. Among the protesters were Complainant and his wife. Complainant's wife had been run off the road on one occasion by one of the trucks hauling Respondent's stone. Complainant believed the use of the road by the trucks was dangerous, and there is evidence that the trucks caused considerable damage to the road. Superintendent Cooper was aware that Complainant was involved in the protest. He called a meeting and explained to Complainant and other employees that the truck route was of great importance to the company.

The leader of the protest movement was A. L. Lazemby, a farmer whose land was close to the road in question, and who used the road in connection with the operation of his farm. On February 24, 1983, Lazemby blocked the highway with his truck until requested to remove it by the sheriff's office. On the following day, February 25, Lazemby again blocked the road. Complainant knew of the protest and was at the scene when the road was blocked on February 25. He did not participate in the blocking of the road. The news media were present, and pictures of the protest appeared in the newspapers and on television. Complainant's picture was included since he was present. Cooper observed Complainant's presence, and assumed that he was part of the protest movement. When Cooper returned to the plant he called Mr. Kenneth Roberson, Vice President of Respondent, and told him about the roadblock, and that Complainant was seen among the protesters. Cooper asked what should be done about Complainant. Roberson, after discussing the matter with the Legal Department, decided to terminate Complainant. He dictated a memorandum to Cooper to deliver to Complainant.

On February 25, 1983, Complainant was given a notice of termination for "conduct unbecoming a Southern Stone Employee." The conduct was described as being seen "in a group of people that were blocking an approved route for trucks leaving Southern Stone Plant."

Roberson was not aware of Complainant's employment history prior to February 24 and 25, 1983, which are recited herein.

ISSUES

1. Was Complainant's discharge motivated in any part by conduct protected under the Act?
2. If so, did Respondent establish that he would have discharged Complainant for unprotected activities alone?
3. If Complainant's discharge was in violation of the Act, what relief is he entitled to?

CONCLUSIONS OF LAW

To establish a prima facie case of discrimination under the Act, Complainant must show that he was engaged in activity protected by the Act, and that his discharge was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Bush v. Union Carbide Corporation, 5 FMSHRC 993 (1983).

PROTECTED ACTIVITY

Complainant's call to MSHA asking about hard toe shoe requirements was activity protected under the Act. Respondent was clearly unhappy about the call and in effect directed Complainant not to make such calls thereafter. Assisting a fellow worker in making a complaint to MSHA is protected activity, but there is no evidence that Respondent was aware of Complainant's efforts on behalf of Willie Calloway.

Complaints to management about other employees "riding the clock" could be protected insofar as they allege that this practice jeopardized the safety of Complainant or the other workers. Although the evidence does not directly show that the complaints were related to safety, I can infer that they were, and conclude that they constituted protected activity. The testimony concerning drinking and horseplay on the job does not show that any complaints or work refusal grew out of these activities. Therefore, activity protected under the Act was not shown in connection therewith. Complainant's allegations that he was disciplined for taking time off following his non work connected hand injury, and that Respondent threatened to fire him, do not allege activity protected under the Act. No contention that this discipline or threat were related to work safety was made by Complainant.

The allegations concerning Complainant's job related injuries in May, 1981, and September, 1982, do not contain any contention that occupational safety was involved. The alleged direction to change the hospital records to falsely show a non-job related injury may allege a violation of the State Workers' Compensation Law. It does not describe activity protected under the Mine Safety Act.

A considerable part of the evidence in this case, and of Respondent's posthearing brief is devoted to Complainant's participation in the citizens protest against the use of a road as a truck route. The relationship of this protest to safety goes only to the matter of highway safety, and there is no contention and no evidence that it related in any way to occupational safety at Respondent's Plant. Whatever the nature and extent of Complainant's involvement in the protest, it did not constitute activity protected under the Act.

MOTIVATION FOR DISCHARGE

The precipitating factor in the decision to discharge Complainant was his participation in the truck route protest, or rather Respondent's perception of his participation in the protest. I have previously concluded that this was not protected activity. The present status of the employment at will doctrine in American law is an interesting question, but not one that I am called upon to answer in this proceeding. Whether the discharge of an employee for exercising First Amendment rights of free speech and political protest is against public policy is also a question not before me. See Note, Protecting at Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith, 93 Harv. L. Rev. 1816 (1980).

The decision to discharge Complainant was made by Kenneth E. Roberson, after he was informed by Cooper of Complainant's truck route protest activities. Roberson was not aware of Complainant's call to MSHA concerning the hard toe shoe incident in November, 1982. Although Cooper was aware of that incident, the evidence does not establish that it was a factor in the decision to discharge Complainant. Nor is there any evidence that the complaints' of employees riding the clock played any part in the discharge. For these reasons, I conclude that Complainant has failed to make a prima facie case of discrimination under the Act. Further, even if it were shown that protected activity was a motivating factor, the evidence is overwhelming that Respondent would have discharged Complainant for unprotected activity (the truck route protest) alone. Therefore, no violation of section 105(c) of the Act has been established.

ORDER

Based upon the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED for failure to establish a violation of section 105(c) of the Act.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEB 23 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 83-4
Petitioner	:	A.C. No. 13-01855-03501
v.	:	
	:	No. 6 Mine
MICH COAL COMPANY,	:	
Respondent	:	

DECISION

Before: Judge Kennedy

This matter is before me on (1) the regional solicitor's motion to withdraw his petition for assessment of a civil penalty pursuant to Rule 11, (2) Judge Merlin's order denying the motion and directing the submission of information to support the compromise, (3) Judge Merlin's order to the regional solicitor to show cause for ignoring his order to submit information, (4) Judge Merlin's order assigning the matter to this trial judge, (5) the regional solicitor's request for reconsideration of Judge Merlin's order together with information in support of the motion to withdraw, (6) this trial judge's order to the parties to brief the jurisdictional issue and to furnish additional information to enable the judge to determine the gravity of the violation and the adequacy of the \$20 penalty proposed for the offense charged, (7) the operator's response thereto, and (8) a notice of appearance by Michael McCord on behalf of the Secretary together with (a) a motion to suspend compliance with my order and (b) a motion requesting certification to the Commission of the Secretary's claim that a motion to withdraw a petition for assessment of a civil penalty at any stage of a penalty proceeding does not require formal judicial approval by the trial judge or the Commission because there is no longer a dispute between the parties subject to the Commission's jurisdiction. This latter issue goes far beyond any question I had heretofore imagined was presented by the regional solicitor's motion. For this reason alone, I would have denied the request for certification.

I deem this record a particularly inappropriate vehicle for decision of the question posed by Mr. McCord. I am also at a loss to understand why the Secretary sought to avoid a decision by the trial judge by filing a simultaneous request for interlocutory appeal with the Commission. At the time this request was filed I had not received a response to my order and had neither denied or granted the regional solicitor's pending motion to withdraw. If I grant the motion, any appeal would appear to be moot. Unless, of course, the Secretary can prevail on the Commission to issue an advisory decision on the basis of the Secretary's ex parte briefing on the matter. I do not believe the Commission's rules provide for such a decision and certainly not under the guise of an interlocutory appeal from a nonexistent dispute.

In any event, after this matter was assigned I determined the record was still deficient with respect to several of the statutory criteria, including prior violations, size of the operator and its true financial condition. I also determined that before I ruled on the regional solicitor's claim that under the circumstances presented "section 110(i) and 110(k) of the Act do not apply" to Rule 11 motions "because the Secretary has not sought an assessment to which section 110(i) would apply nor has he in any manner settled, compromised, or mitigated a penalty so as to cause section 110(k) to be invoked," I would await the solicitor's response in a related matter, Pyro Mining Company.

Interestingly enough, Mr. Mascolino's response in Pyro was at variance with both that of the regional solicitor and Mr. McCord. At this point, it is important to note that in this case (Mich Coal), the motion is to withdraw a petition for assessment of a penalty whereas in the Pyro case the motion is to dismiss the operator's "Request for Hearing with Review Commission" the so-called green card which is the operator's first pleading and notice of intent to contest the penalty proposed. In Pyro, the operator recanted his notice of contest almost immediately after he filed it by paying the amount of the penalty proposed, \$20. Mr. Mascolino on behalf of the solicitor urged that this type of case be treated differently from a case like Mich Coal in which both the operator and the Secretary seeks to opt out after the Secretary's proposal for penalty has been filed with the Commission. Mr. Mascolino argued that:

The issue is not whether the Commission's jurisdiction technically attaches when the contest card is received. The issue is whether the operator who

promptly disavows that course should be permitted to do so without the examination which would be involved if the case were to be tried or payment submitted after a petition had been filed and issue joined. (Emphasis supplied.) Statement in Support of Motion to Dismiss filed February 7, 1984.

Mr. Mascolino seems to recognize that once a petition for assessment of a civil penalty has been filed the Commission and the trial judge have exclusive jurisdiction to approve dismissal under Rule 11 or a settlement under Rule 30. But, Mr. Mascolino argues, where the petition for proposal of a penalty has not been filed the Commission's jurisdiction is so tenuous or "technical" the parties should not have to justify what is tantamount to a voluntary nonsuit.

Before ruling on either of these matters, I would have preferred to consolidate them for briefing and oral argument so that I could have a record for the public and the Commission setting forth all the nuances of law and permutations of fact that are involved. Because of Mr. McCord's attempt at a preemptive strike that may no longer be a viable option. At a minimum the three solicitors involved seem to want answers to the following questions:

1. Should the Commission allow voluntary dismissals or nonsuits where an operator "promptly" after filing a notice of contest tenders payment in full of the penalty proposed by MSHA? (Mr. Mascolino's position).
2. Should the Commission require its judges to grant motions to withdraw proposals for penalties filed by the Secretary before an answer has been filed without any record support other than a showing that payment has been made? (Regional Solicitor's position).
3. Should the Commission require its judges to grant motions to withdraw the Secretary's proposals for penalty at any stage of a penalty proceeding, i.e., at any time prior to issuance of the judge's final decision without satisfying the judge that such a disposition is appropriate and in accord with the purposes and policy of the Act? (Mr. McCord's position).

Each of these questions and variations thereon must be answered in the light of the Congressional purpose embodied in sections 105(d), 110(i) and 110(k) of the Act as well as Commission Rules 10, 11, 26, 29(b) and 30. While for reasons previously and hereinafter indicated, I find it inappropriate and unnecessary to decide any of the foregoing questions definitively, I find most shocking the proposition advanced by Mr. McCord on behalf of the Secretary. For if I understand it correctly Mr. McCord is moving boldly, if somewhat recklessly, to usurp the authority and power conferred on the Commission by section 110(i) and 110(k) of the Act. 1/ These provisions as well as the entire legislative history of the Act are redolent with expressions of Congressional distrust of MSHA's ability to retain its professional objectivity and commitment to vigorous enforcement when confronted with industry blandishments. Secretary v. Parmalou Bros., Inc., Dkt. No. WILK 79-4-PM et al, decided February 13, 1979.

The plain language of the Commission's Rules and section 110(i) and (k) of the Act convincingly establish that the Presiding Judge and not MSHA or the solicitor is charged with responsibility for deciding whether to approve a Rule 11

1/ Because of the importance of the questions raised to the proper administration and vigorous enforcement of the Mine Safety Law, and the Secretary's desire to rush the Commission to judgement, I have undertaken to set forth my preliminary views of this long festering dispute. I regret that due to the desire of the Commission's staff to take jurisdiction of these questions away from me, I have not had the time for the mature deliberation and research I think they deserve. Nor has the solicitor, Mr. McCord, helped by churlishly refusing to brief the matter for me--preferring instead the route of an ex parte interlocutory appeal to the Commission. While the bypass tactic may strike some as clever, I find it ethically distasteful. I trust the Commission will find equally distasteful the prospect of being asked to render prematurely an ex parte decision on so sensitive a matter. Indeed, I feel the matter is of sufficient importance that it should be decided only after all affected interests are afforded an opportunity to be heard. This, of course, is not the first time the commonality of interest between the solicitor and the operators has been conjoined in an attempt to stampede the trial judge and the Commission over a volatile policy issue. As I have said, I do not believe the Commission should entertain the Secretary's request for an interlocutory appeal but if it does it will have something beside a totally ex parte record to consider.

motion to withdraw or a Rule 30 motion for settlement. 2/ In fact, Rule 11 specifically provides that while a party may withdraw a pleading at any stage of the proceeding, it may do so only with the "approval of the Commission or the Judge." Judicial approval certainly connotes something more than a mere ministerial act. The Commission should not become party to a procedure, however innocuous on its face, that may result in subversion of the Congressional policy of full, true and public disclosure of the basis upon which penalty cases are compromised, settled, withdrawn or dismissed.

As Judge Merlin so trenchantly observed:

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

Order of July 15, 1983.

I am aware that the Solicitor's Office at the direction of the Assistant Secretary has adopted a policy of filing Rule 11 motions in lieu of motions to approve settlement

2/ On September 29, 1980, former Chief Administrative Law Judge Broderick wrote the Assistant Solicitor, Arlington, Virginia that: "It is the position of the Review Commission that its jurisdiction attaches when a notice of contest is filed in our docket office. This is true whether the cases involve a quick change of heart by the operator or a mistake or a late payment. They can only be closed by a Commission Order." Section 105(d) and Commission Rule 26 both require notices of contest to be docketed "immediately" with the Commission. The solicitors, or at least some of them, now concede jurisdiction attaches when the notice of contest is filed but all of them seek a ministerial order of dismissal if, upon the advice of his own counsel or that of the solicitor, the operator decides MSHA really made him an offer he can't refuse.

in an effort to implement the "cooperative," some might even say "lax," enforcement policy of the single penalty assessment procedure. See 30 C.F.R. 100.4. But as I have said elsewhere, prosecutorial discretion does not extend to nullifying the Act. There are limits on the power of MSHA and the solicitor to thwart the will of Congress. One of them is this Commission.

The solicitor is compelled to seek approval of Rule 11 and Rule 30 motions because the Commission following the will of Congress has so decreed. Congress, in its wisdom, changed the law in 1977 to require approval of all "compromises" of penalty cases. This embraces both "mitigations" and "settlements." A motion to withdraw a penalty petition in lieu of an adjudication by the Commission is certainly a compromise of the litigation and if it involves acceptance of a \$20 penalty that MSHA improvidently, erroneously or intentionally assessed for a significant and substantial violation it is both a mitigation and a settlement that should receive the strictest judicial scrutiny.

The legislative history of section 110(k) of the Act shows Congress felt the public interest in vigorous enforcement is best served when the process by which penalties are assessed is carried out in public, "where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process." S. Rpt. 95-181, 95th Cong., 1st Sess. 44-45 (1977). As the Senate Report continued, "the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties." Id.

I cannot believe the Commission is going to surrender its statutory enforcement authority by ordering its judges to rubber stamp motions to dismiss or withdraw. If it does, I am confident there will be a public outcry if the purpose or effect of such action is to grant the solicitor authority denied MSHA by the Congress in 1977.

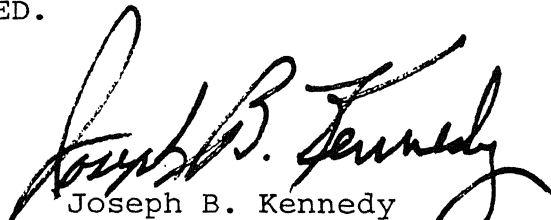
The suggestion that the Commission did just this in Mettiki Coal Corporation, 3 FMSHRC 2277 (1980) is clearly erroneous. The plain meaning of Mettiki is that regardless of how a motion is labelled, i.e., either as a motion to dismiss or withdraw (under Rule 11) or a motion to approve settlement (under Rule 30) if the record in support of the

motion "indicates that full payment of the [penalty initially] sought by the Secretary is a satisfactory and appropriate resolution of [the] controversy" it is an "abuse of discretion" for the trial judge to deny the motion. (Emphasis Supplied.) It was the "abuse of discretion" issue on which Mettiki turned and not on whether the motion was filed under Rule 11 or Rule 30. Nothing in Mettiki shows a disposition to strip the Commission and its judges of jurisdiction and authority to evaluate either type of motion in accordance with the statutory criteria set forth in section 110(i), 110(k) or the purposes and policy of the Act. See, Co-Op Mining, 2 MSHC 106 (1980). Just as it would be unfair to assess a penalty where no violation occurred it would be a travesty to allow the assessment of a \$20 penalty for an egregious violation simply because an overworked or overly sympathetic solicitor calls the operator's attention to the fact that it would be better to pay the penalty than to subject the matter to the scrutiny of a judge charged with responsibility for seeing that there is a full and true disclosure of the facts. Compare, Bethlehem Mines, Inc., 6 FMSHRC _____, Jan. 13, 1984.

Turning to the merits of the instant motion, I find the information furnished considered as a whole is sufficient to support dismissal of this matter because the failure to take a single respirable dust sample posed no significant health hazard and was more the result of oversight than negligence. Further, there is no evidence that the violation was part of a pattern or practice of culpable neglect or knowing failure to comply with the mandatory respirable dust standard violated.

Based on an independent evaluation and de novo review of the circumstances, therefore, I find the compromise of this matter is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion be, and hereby is, GRANTED; the captioned matter DISMISSED; and all other pending motions, including the request for certification for interlocutory appeal, DENIED.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 23 1984

MONTEREY COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 83-68-R
v.	:	Citation No. 2200849; 4/28/83
	:	
SECRETARY OF LABOR,	:	Monterey No. 1 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 83-52
Petitioner	:	A.C. No. 11-00726-03522
	:	
v.	:	Docket No. LAKE 83-61
	:	A.C. No. 11-00726-03524
MONTEREY COAL COMPANY,	:	
Respondent	:	Docket No. LAKE 83-67
	:	A.C. No. 11-00726-03527
	:	
	:	Docket No. LAKE 83-78
	:	A.C. No. 11-00726-03529
	:	
	:	Docket No. LAKE 83-87
	:	A.C. No. 11-00726-03532
	:	
	:	Docket No. LAKE 83-94
	:	A.C. No. 11-00726-03533
	:	
	:	Docket No. LAKE 84-17
	:	A.C. No. 11-00726-03539
	:	
	:	Monterey No. 1 Mine

DECISIONS

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for
Petitioner;
Carla K. Ryhal, Esq., Monterey Coal Company, Houston,
Texas, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

All of these cases were heard in St. Louis, Missouri, on October 25, 1983. Dockets LAKE 83-68-R and LAKE 83-87, were consolidated for hearing and decision, and the remaining civil penalty cases were heard after the conclusion of that hearing. The cases concern civil penalty proposals filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking civil penalty assessments for certain alleged violations of mandatory standards promulgated pursuant to the Act. The parties were afforded an opportunity to file post-hearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of these decisions.

Issues

Consolidated Dockets LAKE 83-68-R and LAKE 83-87, concern a citation served on Monterey Coal Company for an alleged violation of mandatory safety standard 30 CFR 75.1403-5(g). Although the inspector found that that the violation was not "significant and substantial," and MSHA assessed it as a "single penalty assessment" of \$20, Monterey Coal Company contested the violation on the ground that the cited standard applies only to belt conveyors used in the transportation of men and materials, and not to conveyors used to transport coal. Since Monterey contends that its underground belt conveyors are used only to transport coal, it believes that MSHA's reliance on this standard to support its citations is improper.

Dockets LAKE 83-94, LAKE 83-67, and LAKE 83-78, all involve citations issued for alleged violations of Section 75.1403-5(g), three of which were "non S&S" \$20 single penalty assessments. One citation (Docket LAKE 83-78), Citation No. 2199892, is a "significant and substantial" violation which was assessed at \$241.

Dockets LAKE 83-52 and LAKE 83-61, concern "significant and substantial" violations issued by the inspector for violations of mandatory safety standards 30 CFR 75.316, and Monterey Coal Company takes issue with the inspector's special findings.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator

was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that the respondent owns and operates Mine No. 1, that it is subject to the Act, and that the Commission has jurisdiction in these proceedings. In addition, the parties stipulated as to the issuance of the following safeguard notice which served as the basis for the citations alleging a violation of mandatory safety standard 30 CFR 75.1403-5(g):

On September 4, 1975, Notice to Provide Safeguards No. 1 WHW was issued by an authorized representative of the Secretary to Monterey as operator of the Mine ("Notice"). The Notice provided that 'Notice is hereby given that the undersigned authorized representative of the Secretary of the Interior upon making an inspection of this mine on September 4, 1975, directs you to provide the following specific safeguard(s)--24 inch clear travel ways along all belt conveyors each side--pursuant to Sec. 75.1403, Subpart C, of the Regulations promulgated under authority of Section 101 of the Federal Coal Mine Health and Safety Act of 1969 (P.L. 91-173).'

Under the heading "Specific Recommended Safeguards" the Notice alleged that 'A clear travel way at least 24 inches wide on each side of the main north belt-conveyor was not provided at the following locations. Between cross cuts Nos. 21 and 23 (coal and rock), between cross cuts Nos. 93 and 94 (Rib), and between cross cuts Nos. 108 and 109 (coal, Rock, and Rib).'

A clear travel way at least 24 inches wide shall be provided on both sides of all belt conveyors installed after March 30, 1970.

Where roof supports are installed within 24 inches of a belt conveyor, a clear travel way at least 24 inches wide shall be provided on the side of such support farthest from the conveyor.

The parties stipulated that MSHA Inspector Jesse B. Melvin issued the following citations pursuant to Section 104(a) of the Act:

Docket No. LAKE 83-78

On April 13, 1983, Inspector Melvin conducted an inspection at the Mine and issued Citation No. 2199892. The Citation cites a significant and substantial violation of 30 C.F.R. 75.1403-5(g) and, under the heading "Condition or Practice," alleges that "A clear travelway of at least 24 inches wide was not provided along the 4th Main East belt conveyor on the South Side starting at 99 cross-cut and extending inby to cross-cut No. 125, I.D. 000-0. Belt was rubbing coal at 99, 100, 101, 102 and 112 cross-cuts, and belt rubbing frame for rope at 99 cross-cut and it was warm. A clear travelway of 24 inches wide along both sides of the belt is required by a notice to provide Safeguards No. 1 WHW, dated September 4, 1975."

Docket No. LAKE 83-67

On April 14, 1983, Inspector Melvin conducted an inspection at the Mine and issued Citation No. 2199897. The citation cites a violation of 30 C.F.R. 75.1403-5(g) and, under the heading "Condition or Practice," alleges that "A clear travelway at least 24 inches wide was not provided along the South Side of the 4th Main East belt conveyor entry starting at cross-cut No. 33 and extending inby to 10th North track switch. I.D. 000-0 A clear travelway of 24 inches along both sides of the belt is required by a notice to provide Safeguards No. 1 WHW, dated 9-4-75."

On April 19, 1983, Inspector Melvin conducted an inspection at the Mine and issued Citation No. 2199899. The citation cites a violation of 30 C.F.R. 75.1403-5(g) and, under the heading "Condition or Practice," alleges that "A clear travelway at least 24 inches wide was not provided along the 3rd Main East belt entry on the South side from the head rollor [sic] of No. 1 belt drive inby to the tail rollor [sic]. A clear travelway of 24 inches wide along both sides of the belt is required by a notice to provide Safeguards No. 1 WHW, dated 9-4-75."

On April 28, 1983, Inspector Melvin conducted an inspection at the Mine and issued Citation No. 2200849. The citation cites a violation of 30 C.F.R. 75.1403-5(g) and, under the heading "Condition or Practice," alleges that "A clear travelway at least 24 inches wide was not provided along both sides of the Main North coal conveyor belt starting at the No. 1 belt drive unit and extending inby to head rollor [sic] of the 3rd East belt unit approximately 205 cross-cuts. A clear travelway of 24 inches wide along both sides of the belt is required by a notice to provide Safeguards No. 1 WHW, dated 9-4-75."

Docket No. LAKE 83-94

On June 21, 1983, Inspector Melvin conducted an inspection at the Mine and issued Citation No. 2202728. The citation cites a violation of 30 C.F.R. 75.1403-5(g) and, under the heading "Condition or Practice," alleges that "A clear travelway at least 24 inches wide was not provided along the East side of the Main North belt conveyor starting at 236 cross-cut inby to 4 East belt head rollor [sic] approximately 40 cross-cuts. The following material was along the east side of the belt. Large rock, coal, roof bolts and roof blocks, concrete block and roof bolt plates. I.D. 000-0 A clear travelway of 24 inches wide along both sides of the belt is required by a notice to provide Safeguard No. 1 WHW, dated 9-4-75."

Docket No. LAKE 83-52

On December 28, 1982, Inspector Melvin conducted an inspection at the mine and issued Citation No. 2036802, purportedly pursuant to Section 104(a) of the Act. The citation cites a significant and substantial violation of 30 C.F.R. 75.316 and, under the heading "Condition or Practice," alleges that "the dust control plan for this mine was not being followed in the No. 3 entry where the continuous mining machine was loading coal in 3 South off 1 East Unit I.D. 007 in that the exhaust tubing was 22 feet outby the face. The plan states that the exhaust tubing [is] to be maintained within 10 feet of the face as the face is advanced."

Docket No. LAKE 83-61

On February 3, 1983, Federal Coal Mine Inspector Harold Gully, a duly authorized representative of the Secretary, conducted an inspection at the Mine. During the inspection, the inspector issued Citation No. 2063916, purportedly pursuant

to Section 104(a) of the Act. The citation cites a significant and substantial violation of 30 C.F.R. 75.316 and, under the heading "Condition or Practice," alleges that "the section and face ventilation system was not followed in the 4 North off 3 Main East in that the quantity of air in the 18-inch tubing (390 feet from fan) in No. 3 entry to crosscut right, when coal was being cut with a continuous miner, was only 1900 CFM when measured with a magnehelic and Pitot tube The section and face ventilation system Page 4 states '. . . in situations where an excess of 370 feet of tubing occurs and then the minimum quantity shall be 5000 CFM in the working faces where coal is being mined.'"

Discussion

The parties presented the following testimony in Dockets LAKE 83-68-R, LAKE 83-67, LAKE 83-78, LAKE 83-87, and LAKE 83-94:

MSHA's Testimony

MSHA Inspector Jesse B. Melvin testified as to his background and experience. He confirmed that safeguard notice 1 WHW was issued on September 4, 1975, by Inspector Willis Wrachford and Mr. Melvin explained the procedure for issuing such a safeguard and the application of the safeguard once it is issued (Tr. 8-10). He stated that the safeguard notice was issued pursuant to section 75.1403-5(g), which requires that clear travelways at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970 (Tr. 11).

Inspector Melvin stated that except for one citation issued in Docket LAKE 83-78, all of the other citations were "non-S&S," and that in those instances he made no negligence, gravity, or good faith findings on the face of the citations because those were his instructions by his district office (Tr. 17). He explained his "S&S" finding on the one citation as follows (Tr. 18):

THE WITNESS: In the body of the citation, it will say that it was also an accumulations [sic] of coal and that the coal was up to the bottom of the belt. It will also tell you in there that the belt was rubbing the framework stands that developed, ropes and rollers it was attached to, and it was worn, which could set off the coal dust. The loose coal and coal dust in the citation extended into the 24-inch walkway is why it was all combined into one.

In my opinion, when they cleaned the walkway up the 24 inches, they would also clean this up. That is why that S&S was S&S, that is why it was marked in negligence in the gravity.

In explaining Citation No. 2200849, April 28, 1983, and Citation No. 2199899, April 19, 1983, which simply state that clear travelways of at least 24 inches were not provided along both sides of certain conveyor belts, Inspector Melvin explained that portions of the walkways concerned him because roof falls had occurred which obstructed the travelways (Tr. 29-31). He conceded that if the walkways contained tripping hazards, had coal accumulations present, or presented hazards at unguarded belt roller or pinch point locations, he could have issued citations citing the specific mandatory standards which apply to those situations rather than relying on the safeguard notice (Tr. 32-36).

Mr. Melvin testified that the cited conveyor belts were in active workings and they were required to be examined. He also indicated that belt examiners are required to walk the belts, and that they usually travel the "best side" of the belts. However, if the travelways are obstructed by rock falls or coal accumulations, the belt examiners will not inspect those sides of the belt because they do not have ready access to the areas (Tr. 37-41).

Inspector Melvin confirmed that all of the cited belt conveyors are used only to transport coal and that none of them are designated as mantrips. He also confirmed that the hazards that the citations address concern people who happen to be walking along the travelways. He identified these individuals as three belt examiners who walk the belts daily, and two individuals who take care of the head rollers (Tr. 49-50).

On cross-examination, Inspector Melvin stated that mine personnel continuously shovel at the belt conveyor head or dumping point (Tr. 58). He confirmed that there is no requirement that belt examiners walk both sides of the belt (Tr. 59). With regard to the one "S&S" citation, Mr. Melvin explained his rationale as follows (Tr. 68-69):

Q. My last questions had to do with significant and substantial. I am still not entirely clear. Was the coal accumulation actually extending on to the walkway?

A. The 24-inch walkway is included for where they start out is from the belt roller--from the ropes, the steel ropes that holds the belt conveyor out 24 inches. The accumulations of the coal was partially into the 24 inches from the belt. I wouldn't say it was all the way out to the rim or I wouldn't say it was away onto the other side. If I had of, I would have put it in my citation.

Q. Now, to the extent that it only extended from the ropes onto the walkway, that by itself, without the accumulation under the belt, would you have cited that significant and substantial?

A. If it had been just from the ropes into the walkway, no, ma'am, if it hadn't had the hot rollers there or the hot--

Q. So your primary concern was the danger of fire?

A. Yes, ma'am. If it had been into the walkway itself, it would have been non-S&S, it would have been just the possibility of a person going by there, stumbling, tripping, causing an injury to his body in some form.

Q. Earlier on, you mentioned figures from eight to thirty people who were exposed to the danger exhibited in this significant and substantial violation. Those thirty people that you mentioned are primarily people who would have been in danger because of a fire or explosion?

A. Yes, ma'am.

Q. It would not have been 30 people who would have been endangered by walking that walkway?

A. No, ma'am, it was possibly two people. It would only be about two people that would be down through that walkway. Like I said, it would be on each shift, two people on the first shift. If possible, the men that was working in that neighborhood, if they could have a person working along the belts to clean up, he would be on that side. The examiner, if he was on that side, it could possibly be him.

Q. But at the time of the citation, it was probably how many people?

A. At the time of the citation, there was three of us. There was me, the company personnel, and the union personnel that walked it, that was passing by.

Respondent's Testimony

Dick Mottershaw, respondent's safety coordinator, testified that in 1975 he was the safety supervisor at the No. 1 Mine. He explained the circumstances surrounding the issuance of the safeguard notice as follows (Tr. 71-73):

The notice was issued by Willis H. Wrachford to Ted Spicher who reported directly to me. It was served to Ted. We went into the mine at that time and looked at some of the conditions that Willis had described. Basically, the conditions were that a 42-inch conveyor belt was installed in an entry, in the middle of an entry that was 15 feet, six inches wide, which is the cutting head of our miner, installed in the middle, and some loose walls or ribs as we call them in mining had fell into the walkway on the right-hand side or the east side of the belt areas on our main north type belts.

Willis wanted the entire belt cleaned on both sides and wanted 24 inches or more clearance maintained continually on both sides. We had quite a heated discussion over it and did for several months afterward. We did abate the notice. We only cleaned up one side of the belt up to where there would be an accumulation of coal and we do clean that up.

All of our belts are at least 15-feet, six-inch wide entry, some are 24's and our height is average about seven foot. This is basically what happened.

Q. So we did express our disagreement at the time the notice was sent in?

A. Yes, and we have expressed it since. This seems to be an exclusive of maybe two mines in Illinois or three. We have the same ideal mining whisk, many--basically the same ice and the same conveyor belts 50 miles down the road have never had that requirement, except from the Hillsboro office.

Q. O.K. Now, back to the day that the notice was issued. You say there is a 42-inch wide conveyor belt in a 16--15-foot, six-inch wide entryway. Was it in the middle, to one side? Was there any problem with actually having 24-inch clearance, 24-inch distance between the edge of the conveyor belt and let's say, the rib?

A. No, there would have been 24-inch clearance on both sides. It would be highly improbable, except we had a large pile of roof not to have 24 inches, 24-inch clearance. When you've got seven feet, it doesn't block up and when you've got approximately six feet on each side, it doesn't block up.

Now, you may have a rib that slushes down and there's tripping and stumbling going on there and where you could stumble going over some materials; we have had instances of falls on belts where the examiner in his examination could walk to this point, mark it out, do the bad roof timbers, large rocks that couldn't be moved, he'd walk to the next cross-cut which would be on 75-feet centers and look both ways on the belt there, go to the next one. But you can't require a certified examiner to go in a place that could present him a hazard. He is not required to do that and he does not.

Q. When the notice was issued, it was primarily directed at the fact that although there was a travelway on both sides of the belt that there was foreign material that was just blocking the travelway itself, it was not requiring us to actually cut a travelway?

A. No. The space, the height, the width is there. We have not maintained a stumblefree environment on the opposite of the walkway side of the belt. We will perform some work there if there is an accumulation of coal that we will clean up, but the normal rock falls have maybe a piece of heather board that's fell out, we don't clean that, because our examiners -- the belt being 48 inches wide and 36 inches wide, surely you can see across that far across the belt.

Mr. Mottershaw did not dispute the fact that on the "dirty side" of the belt there is debris that would interfere with one easily walking that side (Tr. 74). He stated that he was thoroughly familiar with the mine belt system, and he indicated that there is no problem in examining the belt (Tr. 75).

In response to further questions, Mr. Mottershaw testified as follows (Tr. 76-79):

JUDGE KOUTRAS: Am I to understand, then, that in your view the sole reason for MSHA issuing the safeguard notice back in '75 and Inspector Melvin's issuance of the citations in '83 is to attempt, through this process, to have both sides of the conveyor system, both travelways maintained in a stumble free environment so as to facilitate the inspection of both sides of the belt, do you feel that is the--

THE WITNESS: I feel that is the only reason, because there's no legal reason that the examiners need to go up either side. There is no reason that they cannot see either side or examine either side. It seems to be the quirk of the field office, because in the subdistrict, I know in the other subdistricts, we have absolutely had the same system, the same conveyor belt, the same width entries and have never had a safeguard in any other area.

JUDGE KOUTRAS: You mean in some of your other mines?

THE WITNESS: Yes, which are within a 50- or 60-mile radius.

JUDGE KOUTRAS: Have you ever asked the district manager why is it in this mine they require this and in your other mines they don't and if so, with what response?

THE WITNESS: I have not.

JUDGE KOUTRAS: You haven't asked?

THE WITNESS: No, sir, I have not.

JUDGE KOUTRAS: It seems to me you should have been asking long ago if you disagreed with it in '75 and here we are as of today trying to convince me, Judge, look are they treating us unfairly here because at the other mines they don't require it.

THE WITNESS: Could I answer that?

JUDGE KOUTRAS: Sure.

THE WITNESS: Long ago, when it was issued, I didn't have the authority to do that, to call a district manager. I did write a strong note in 1978 when we received a violation suggesting that it was illegal and sent it to the legal staff in Houston.

JUDGE KOUTRAS: Well, aside from the illegalities of it, maybe your reluctance to answer was out of fear of the response, yes, or no.

Well, clearly, though, assuming that this belt was a designated mantrip, carried men and materials, and you obviously wouldn't disagree with Inspector Melvin's position here, I mean with MSHA's position that both sides of those belts should be maintained stumble free, right?

THE WITNESS: If it was transporting men or materials, I would have no problem at all maintaining it. I think you'd be unloading from both sides of the belt, both men and materials, and I think it would have to be clean, the same as our track entry. We maintain clearance on that when we transport men and materials.

JUDGE KOUTRAS: I take it that you are in agreement, at least you subscribe to the proposition advanced by Monterey here as a defense that this safeguard notice, Section 75.1403 only applies to transportation of men and materials on belts and that since you transport only coal, that doesn't fall into either of those categories?

THE WITNESS: I've felt that way since '75. I think the intent of Congress was men and materials.

In response to further questions, Mr. Mottershaw stated that the term "materials" as he knows it in his mining experience relates to such items as roof bolts, tubing,

concrete blocks, tracks, roof supports, etc. He also indicated that these items are transported by cars on separate tracks and are loaded and unloaded manually by hand. In his view, the coal which is mined is the "product" and is not "material" within the meaning of the cited standard. The coal is loaded out of the mine on the belt conveyors in question and "it goes straight on top of the coal mine" (Tr. 90).

Dockets LAKE 83-61 and LAKE 83-52

In Docket No. LAKE 83-61, the respondent conceded that the conditions or practices as stated by MSHA Inspector Harold Gulley in the citation which he issued are accurate and that they do in fact constitute a violation of mandatory standard 30 CFR 75.316 (Tr. 3).

Mr. Gulley was not present at the hearing. Respondent's counsel stated that the citation was contested because the respondent did not believe that the violation was "significant and substantial" (S&S).

In Docket No. LAKE 83-52, the respondent conceded that the conditions and practices cited by the inspector were accurate, and that those conditions constituted a violation of the cited mandatory standard. Respondent contested the citation because it did not believe that the cited conditions presented a "significant and substantial" violation (Tr. 6-7).

MSHA Inspector Jesse B. Melvin confirmed that he issued citation no. 2036802 because he found that coal was being mined in the No. 3 entry and the ventilation exhaust tubing was found to be 22 feet from the face area where the coal was being loaded. The approved ventilation plan requires that the exhaust tubing will be no greater than 10 feet from the face at any time coal is loaded at the face.

Mr. Melvin stated that it is important to keep the exhaust tubing 10 feet from the face so as to ventilate the face and prevent an accumulation of dust, explosive gases and methane. He confirmed that he took a methane reading at the face and found from one to two-tenths of one percent of methane and that this "was not too high." He took his reading at the last line of roof supports where the continuous miner operator is located, approximately 20-22 feet outby the face. He could not test the methane at the face, and he estimated from the places which were cut that the ventilation tubing which he observed was at that location for approximately 25 to 30 minutes. He also indicated that he had previously cited the respondent for the same condition in other sections of the mine (Tr. 8-10).

Inspector Melvin stated that the mine is considered a gassy mine, that methane bleeders can be encountered any time, and that proper exhaust ventilation is required to dispel such gases. He confirmed that the mine is on a "Section 103 five-day spot inspection" cycle because of the amount of methane liberated (Tr. 11). He confirmed that the highest concentration of methane that he has detected in the mine was "about a half per cent of one" (Tr. 13).

Mr. Melvin indicated that in the event of a methane ignition, the resulting fire would travel in the direction of the machine operator who is seated on the right side of the machine. Mr. Melvin confirmed that the machine operator was loading coal at the time of the inspection. He also confirmed that the machine has a methane detector on it and that he found nothing wrong with it (Tr. 20).

Mr. Melvin stated that the presence of respirable dust can result in, or contribute to, black lung if allowed to continue, and if the ventilation plans are not followed (Tr. 22).

Mr. Melvin stated that the respondent was negligent because it was readily observable that the continuous miner was approximately 22 feet from the face, and that the ventilation tubing was at that same location and distance from the face (Tr. 23). When asked why he believed the violation was "significant and substantial," Mr. Melvin responded as follows (Tr. 23-25):

THE WITNESS: I believe if the condition would continue to exist it would cause a serious injury to a person, cause them lost time from work, or could be restricted duties, or could be permanent disability.

BY MR. CARMONA:

Q. In what way?

A. The significant and substantial is the condition continues to exist at this mine, or continued to exist around, it could be-- well, it could be a buildup of just about anything you could have. If it continues to happen you could have a buildup of methane at the mine, you could have the buildup of respirable dust. The condition was to

continue, based on--if the condition exists and continues to exist, someone will sooner or later be injured from it.

Q. Did you take into consideration in your conclusion that it was significant because of the fact that you found the same condition before in the same mine, is it?

A. Yes, sir. I have found it.

Q. Was this a factor in your conclusion or not?

A. The factor in my conclusion is that any time a gassy mine, and they're not following the ventilation plan, there's a possibility of having an ignition or explosion at the face.

Q. Suppose you had found this condition only once, and you knew that this was the only time that it had been found by the Mine Safety Administration, would you have rated this as significant?

A. That would be hard to say. If it was the first time it ever happened at a mine, you'd have to weigh all the evidence. The first time, if it's the first time it ever happened at this mine, they had never had that before, you'd give them the citation--I'm not saying you wouldn't, but weighing it down to where you would give them an S and S on it, if it was the first time and I found methane there I'd give it to them. If it was the first time at the mine and it was so dusty in there you couldn't see the operator I would give it to them. You'd have to weigh it for the first time. He has violated these plans by not keeping his tubing up, but I really don't know if he had other things in there it would fall into it, but just having the tubing back from the face 22 feet and I didn't find no gas and no dust, and it's the first time and they weren't making a habit of it, I really don't know if I would or not. I really couldn't say.

On cross-examination, Mr. Melvin confirmed that while he detected no excessive amounts of methane at the time of his inspection, he did not know the amount which may have been

present at the face. He also conceded that he did not know whether any respirable dust which may have been present exceeded the allowable limits since he took no dust samples (Tr. 28-29). He believed that the ventilation tubing was exhausting some of the dust, but by being 22 feet from the face it was half as effective as it would be if it were located at the required 10 feet from the face (Tr. 31).

Mr. Melvin stated that when the continuous miner was cutting coal at the face the ventilation tubing was probably less than 10 feet from the face, but that when the operator pulled the machine back he did not extend the ventilation tubing from the time he was cutting until he pulled back to the 22 foot distance. In Mr. Melvin's opinion, the tubing was not within 10 feet of the face for any considerable length of time before he arrived on the scene (Tr. 32). He then stated that the area was out of compliance for approximately 15 to 20 minutes (Tr. 34). He reiterated his concern that in the event a methane bleeder is encountered while the mining machine is cutting coal, an ignition could occur without warning (Tr. 36).

In response to further questions, Mr. Melvin confirmed that he found nothing wrong with the continuous mining machine, and he issued no other violations (Tr. 38). He further explained his "S&S" finding as follows (Tr. 39-44):

JUDGE KOUTRAS: Now when you find, for example, that one of the primary tools for maintaining the levels of dust and methane at or below the hazardous level as the exhaust tubing, then it goes without saying that in all of those similar situations you would find all of them S and S, wouldn't you? Any time you found a tubing that's 22 feet when it's supposed to be 10, you would more than likely find that Significant and Substantial, wouldn't you?

THE WITNESS: No. If he cited the plan--I cited his plan for not following his plan there, and it was maybe at all times that you cite the plan maybe he's not 22 feet out there. Maybe it would be--

JUDGE KOUTRAS (interrupting): No, what I'm saying is, could you give me a hypothetical when you--let's assume you found a ventilation tubing that was 22 feet, given the same circumstances as this case, give me an example as to how you would consider that to be Non-S and S.

THE WITNESS: You couldn't if it was out there 22 feet. You'd have to run S and S.

JUDGE KOUTRAS: So what I'm saying is, is the fact that you found this tubing 22 feet when it should have been 10, without further ado you found that to be significant and substantial, did you not?

THE WITNESS: Well, yes and no. You weigh the other conditions, but 22 feet out is that he's not following his plan, and it's not effective when it's that far out.

* * * *

JUDGE KOUTRAS: Now what I'm driving at is that the factors that you consider in determining whether or not a violation is S and S, is it a specific circumstance of the situation that you are faced with at that time?

THE WITNESS: At that time, yes, sir.

JUDGE KOUTRAS: Or is it the fact that it's in your mind, a serious violation of the ventilation plan for failure to have the tubing where it's supposed to be?

THE WITNESS: At that time it's not the seriousness of the tubing, it's the seriousness of the tubing being back there.

JUDGE KOUTRAS: Well, the problem here is, though, if there's no methane and there's no dust test, and we don't know what the level of dust is. If we don't know the levels of dust and we don't know if the methane is down, and if the situation only existed for 15 minutes, why, on those particular facts do you think this is significant and substantial?

* * * *

THE WITNESS: The way that I see it when I go in on the place is if they don't care when I'm on the section whether they follow the plan or not, are they going to follow it when you're not there? So you've got to weigh it. If you're

sitting there watching them, or standing there watching or walk up there and watching them load coal and they know you're there and they don't make no effort, then they are not doing it when you're not there. So it will, if not corrected, sooner or later, cause an effect on a person's life, health.

JUDGE KOUTRAS: But you have no reason to believe that this is the case, though? Just like you were telling me about the jumping out of the methane monitors? I mean, even though you may know that as a former miner, and now as a mine inspector, and even though you may know that human frailties and people being what they are, may not comply when you're not there, this could be true of any violation you write in a mine, isn't it?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: So theoretically, every citation you issue should be S and S, without further ado?

THE WITNESS: It's what they call a judgment call on that, and my feeling at the time I issued the citation it was to continue to happen that will cause serious illness or permanent injury to the person that's in that atmosphere.

Mr. Melvin was shown a copy of a citation he issued 25 days after the one at issue in this case (exhibit R-1), and he was asked to explain why he did not mark it "S&S" since it involved a similar ventilation violation. He explained his reasons, and emphasized that when he observed the conditions no coal was being mined and that he had no way of proving what had occurred on the previous shift (Tr. 54-56).

Respondent's testimony

Dick Mottershaw, respondent's safety coordinator, testified that the purpose of the ventilation exhaust tubing is to remove methane and respirable dust from the mine, and he believed that the primary purpose of the tubing is to control the dust (Tr. 58). He explained the procedure used at the mine to install and maintain the proper ventilation tubing distances (Tr. 58-61).

Mr. Mottershaw conceded that the violation issued by Mr. Melvin resulted from the fact that the ventilation

tubing was not extended forward to the required location at the face (Tr. 61). He stated that the actual time that the violation existed here was 15 minutes, but that in any case the maximum time would have been 30 minutes (Tr. 62).

Mr. Mottershaw stated that his records reflect that the No. 7 unit had been previously cited for excessive respirable dust levels. One citation was issued in 1981, and one in 1982. Both citations were "non-S&S" (Tr. 64). He also confirmed that in the 12 years he has been at the mine, no citations have ever been issued for excessive levels of methane (Tr. 64).

With regard to the citation issued by Inspector Gulley in Docket LAKE 83-61, Mr. Mottershaw stated that an air reading measurement in the ventilation tubing itself indicated over 6,000 cubic feet per minute, which met the required air velocity requirements. Unit 11 was previously cited on February 3, 1982, and for the year preceding the citation issued by Mr. Gulley, no citations were issued for exceeding the allowable respirable dust levels (Tr. 68).

Mr. Mottershaw stated that with regard to both citations in question, the water sprays on the continuous miner were operating to minimize the dust at the face, and the mine fans exhaust approximately 700,000 cubic feet of methane per minute. He also stated that the required air currents are maintained to insure adequate fresh air in the working places (Tr. 70).

With regard to the air velocity measurement made by inspector Gulley in LAKE 83-61, respondent's counsel stated that she did not dispute the 1,900 measurement taken by the inspector to support his citation. Counsel pointed out that 10 to 15 minutes before the inspector arrived, mine personnel measured over 5,000, and that the inspector's low reading resulted from the fact that rock dust bags were pulled into the fan and restricted the air flow. The restricted air flow was short-term, and a new reading would have been taken during the next coal cycle. Counsel pointed out that when the bags were removed from the fan, and the fan moved closer to the face, the required air velocity was exceeded (Tr. 81-83).

Jack Lehmann, General Mine Manager, Monterey No. 1 Mine, testified that regular methane readings are made at the mine by the section foreman every two hours during an eight hour shift, and the results are recorded in his preshift and on-shift books. The machine operators take readings every 20 minutes, and preshift examiners take readings during their examinations (Tr. 84-85).

Mr. Lehmann stated that according to the mine record books, the methane readings for the entire month of December 1982, and the entire month of February 1983, for the No. 7 and No. 11 units reflected "zero levels of methane" (Tr. 86).

In response to further questions, Mr. Lehmann stated that water sprays to control the dust are standard equipment in all of the respondent's mines. With regard to the citation issued on December 28, 1982, for failure to extend the ventilation tubing, Mr. Lehmann conceded that the violation occurred because of the failure by the equipment operators to extend the tubing. With regard to the walkway citations, Mr. Lehmann was of the opinion that the cited standard does not apply to both sides of the walkways in question. He conceded that the walkways where there were falls presented a situation where they were not maintained, but that they were all cleaned up to abate the citations. He also conceded that if the safeguard notice is upheld, respondent would be required to insure that both sides of all conveyor walkways be cleaned up and maintained in that condition (Tr. 86-89).

Findings and Conclusions

LAKE 83-67 - Fact of Violations

Citation No. 2199897, issued on April 14, 1983, cites the failure by the respondent to maintain a clear travelway of at least 24 inches wide along the south side of the 4th main east belt conveyor entry, beginning at crosscut No. 33 and extending inby to the 10th north track switch. Inspector Melvin's citation does not further explain or specify any conditions supporting the conclusion that the travelway was not maintained clear for at least 24 inches wide along the cited areas.

Citation No. 2199899, issued on April 19, 1983, cites the failure by the respondent to maintain a clear travelway of at least 24 inches wide along the 3rd main east belt entry on the south side from the head roller of the No. 1 belt drive inby to the tail roller. Inspector Melvin's citation does not further explain or specify any conditions supporting the conclusion that the cited travelway was not maintained clear for at least 24 inches wide along the cited areas.

LAKE 83-87 and LAKE 83-68-R - Fact of Violation

Citation No. 2200849, issued on April 28, 1983, cites the failure by the respondent/contestant to maintain a clear travelway of at least 24 inches wide along both sides of

the main north coal conveyor belt starting at the No. 1 belt drive unit and extending inby to the head roller of the 3rd east belt unit for approximately 205 crosscuts. Inspector Melvin's citation does not specify or explain any conditions supporting the conclusion that the cited travelway was not maintained clear for at least 24 inches wide in the cited area.

When asked to explain the circumstances under which he issued Citation No. 2200849, Inspector Melvin replied "there was something there that concerned me and portions of it was walkways and just portions of it there would be an accumulation." He also alluded to certain roof falls which had occurred, and which were timbered over or marked out by the belt examiners (Tr. 29-30).

When asked to explain the circumstances under which he No. 2299849, Inspector Melvin stated "again they would have falls, the roof falls, * * * and I couldn't tell you off hand how many crosscuts out there, about halfway down through there they have falls" (Tr. 30). He also alluded to some bad top, and the fact that when bad is encountered "they are supposed to either cross over or under that belt" (Tr. 31).

Inspector Melvin conceded that he failed to detail the conditions he observed in his citations, and he agreed that this should have been done (Tr. 31). He explained that since "company people and union people" travel with him on his inspections, he assumes they know what he has in mind, and he stated that "we all see this and we don't take it offhand that somebody is going to read the citation that don't know what we are talking about" (Tr. 31). When asked whether or not the respondent knew what the inspector was citing, counsel stated "I would imagine a company person, walking around with them, was able to determine exactly what was disturbing the inspector" (Tr. 32). During a bench colloquy regarding the question of specificity of the citations, petitioner's counsel stated "well, they understood what it was" (Tr. 47).

Section 104(a) of the Act requires an inspector to issue a citation with reasonable promptness when he believes that a mine operator has violated the Act, or any mandatory health or safety standard promulgated under the Act. The law also requires an inspector to state and describe in writing with particularity the nature of the violation. I construe this statutory language as a condition precedent to any citation, and an inspector is obligated to at least specify on the face of his citation the specific condition or practice that he observes which leads him to believe that a mine operator has violated the law.

In the instant proceedings, insofar as Citation Nos. 2199897, 2199899, and 2200849 are concerned, Inspector Melvin's citations do not recite any conditions that would, on their face, support the conclusion that the respondent failed to maintain clear travelways on both sides of the cited belt conveyor in question. Further, in support of these citations, his testimony only generally alludes to certain concerns that the travelways were somehow obstructed by roof falls or coal accumulations.

Given the extent of the areas cited by Inspector Melvin, it is simply impossible to decipher the particular conditions or practices which may apply to each of the citations in question. For example, in Citation No. 2200849, while he asserts that the respondent failed to maintain a clear travelway on both sides of the belt conveyor for a distance of "approximately 205 crosscuts," there is absolutely no evidence or testimony to support such a conclusion. His testimony that there was something present "that concerned him," and that "portions of his concerns" dealt with coal accumulations, and "portions" dealt with obstructed travelways, is simply insufficient or totally lacking as credible evidence to support a citation.

After careful consideration of the record in this case, including close scrutiny of Inspector Melvin's testimony, I conclude and find that he has failed to support his conclusions that the respondent failed to maintain clear travelways of at least 24 inches wide at the cited areas. I also conclude and find that Inspector Melvin failed to follow the requirements of Section 104(a) of the Act that any alleged violative conditions or practices be described with particularity.

While it is true that the citations were abated, and that the abatement process itself suggests that the respondent may have had knowledge of the conditions or practices which concerned the inspector, on the facts here presented, there is absolutely no testimony as to what was done to achieve abatement. The termination notices simply state that "clear travelways were provided." Coupled with the fact that Inspector Melvin failed to clearly articulate any conditions or practices which led him to believe that the cited travelways were not maintained as required by the safeguard notice in question, as well as his failure to describe with any semblance of particularity the conditions or practices supporting any of these citations, I simply have no basis for finding that the petitioner has carried its burden of proof in establishing the alleged violations.

Since I am vacating the three citations in question in Dockets LAKE 83-67, LAKE 83-87, and LAKE 83-68-R, I see no reason to address the question as to whether or not section 75.1403-4(g) is applicable to the belt conveyors in question. Even if I were to find that it is, I would still vacate the citations for the reasons articulated herein.

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has failed to establish the fact of violations by a preponderance of any credible testimony or evidence with respect to Citation Nos. 2199897, 2199899, and 2200849. Accordingly, they ARE VACATED. Contestant/respondent's contest challenging Citation No. 2200849 IS GRANTED.

Findings and Conclusions

LAKE 83-94 - Fact of Violation

Citation No. 2202728, issued on June 21, 1983, cites the failure by the respondent to maintain a clear travelway of at least 24 inches wide along the east side of the main north belt conveyor starting at the 236 crosscut inby to the No. 4 east belt head roller for approximately 40 crosscuts. Inspector Melvin's citation described materials such as "large rock, coal, roof bolts, roof blocks, concrete block, and roof bolt plates," as being present along the cited belt conveyor. Inspector Melvin concluded that the violation was not significant and substantial, and he did so because he did not believe that the accumulated materials which he found to present a tripping hazard posed a real threat of a mine fire such as that posed by accumulations of loose coal and coal dust rubbing or touching the belt conveyor. In short, his theory is that "if they build a 24 inch walkway there, and later put material there, they obstruct the people walking there" (Tr. 25).

LAKE 83-78 - Fact of Violation

Citation No. 2199892, issued on April 13, 1983, cites the failure by the respondent to maintain a clear travelway of at least 24 inches wide along the 4th east belt conveyor along an area encompassing some five crosscuts. Inspector Melvin's citation states that the "belt was rubbing coal" at the five crosscut locations, and that at one of the crosscuts the belt was "rubbing frame for rope" and that "it was warm."

Inspector Melvin found that the violation was "significant and substantial." In its posthearing brief, at pages 7-8,

respondent does not dispute the fact that the belt conveyor, as well as the belt rope frame, were in fact rubbing or touching the accumulations of coal as described by the inspector. As a matter of fact, the respondent stipulated that the combination of loose coal and coal dust described did in fact reach up to the conveyor belt and the bottom belt roller. Further, the respondent stipulated that dry loose coal and coal dust ranging in scope from 8 to 10 inches deep, six to eight feet long, and two to three feet wide were in fact present along the cited belt locations, and that the cited areas were not rock dusted.

Given the aforementioned stipulations and admissions by the respondent, it seems clear to me that had the respondent been charged with a violation of mandatory standard section 75.400, which proscribes such accumulations, I would be constrained to find a violation of that section. Further, given the fact that respondent stipulated that the belt rope frame "was warm," and given the fact that the belt rollers were running in coal accumulations which were not rock dusted, I would also be constrained to find that the violation was "significant and substantial." However, respondent's defense is that the cited section 75.1403-5(g), is inapplicable because the conveyor belt in question is not one used to transport "men and materials," and even if it were used for that purpose, the conditions which prevailed did not amount to a "significant and substantial" violation.

Inspector Melvin testified that the accumulations of loose coal and coal dust on one side of the belt conveyor extended out into the walkway, and he indicated that these accumulations should have cleaned up when the walkway was cleaned. He confirmed that he considered the violation to be "significant and substantial" because the coal accumulations under the belt which were touching and rubbing the belt framework presented a fire hazard (Tr. 18). He conceded that these accumulations should have been cited under section 75.400 (Tr. 21). He also alluded to certain accumulations on the other side of the belt which were not touching the frame, and he considered these to present a tripping or slipping hazard if one were walking by the belt, and he also considered the possibility of someone falling into a belt roller if they tripped or slipped over the accumulations (Tr. 18).

When asked to explain the circumstances under which he would cite an operator with a violation of section 75.400 for coal accumulations, and when he would cite the walkway

standard section 75.1403-5(g), he stated that he could cite either or both standards, and the difference lies in whether or not the accumulations presented a tripping or walking hazard, as opposed to a fire hazard (Tr. 28-29; 41-42).

In its defense to this citation, respondent concedes that had it been charged with a violation of section 75.400, the cited coal accumulations would have violated that section, and would in fact have constituted a "significant and substantial violation." However, respondent argues that it has not been cited with a violation that is clearly intended to minimize the hazards of a fire, but rather, has been charged with a violation of a standard seemingly intended to protect miners from hazardous walking conditions.

Respondent argues that the petitioner should not be permitted to elevate the gravity of a citation to a "significant and substantial" status because of the existence of a condition or practice which has no relation to the hazard addressed by the cited standard. To do otherwise, suggests the respondent, would allow the petitioner to penalize a mine operator for a condition or practice addressed by a standard different from the one actually cited, even if the condition or practice did not amount to a violation of that standard. Respondent insists that the question of "significant and substantial" must be determined in the context of the specific standard allegedly violated, as stated in the specific notice of violation.

The parties have stipulated that the safeguard notice referred to by Inspector Melvin to support his citations was issued on September 4, 1975, by MSHA Inspector Willis H. Wrachford. This Notice to Provide Safeguards No. 1 WHW, states as follows:

Notice is hereby given that the undersigned authorized representative of the Secretary of the Interior upon making an inspection of this mine on September 4, 1975, directs you to provide the following specific safeguard(s)--24 inch clear travelways along all belt conveyors each side--pursuant to Sec. 75.1403, Subpart C, of the Regulations promulgated under authority of Section 101 of the Federal Coal Mine Health and Safety Act of 1969 (P.L. 91-173).

Under the heading Specific Recommended Safeguards the Notice alleged that:

A clear travelway at least 24 inches wide on each side of the main north belt-conveyor was not provided at the following locations. Between crosscuts Nos. 21 and 23 (coal and rock), between crosscuts Nos. 93 and 94 (Rib), and between crosscuts Nos. 108 and 109 (coal, Rock, and Rib).

A clear travelway at least 24 inches wide shall be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide shall be provided on the side of such support farthest from the conveyor.

Although Inspector Wrachford did not testify in these proceedings, petitioner's counsel was permitted to file his affidavit posthearing as part of his proposed findings and conclusions, and the affidavit is included as exhibit P-1 to counsel's brief. In his affidavit, Inspector Wrachford states that he issued the safeguard notice after observing that a clear travelway at least twenty four inches wide was not provided at several locations on the west side of the main north belt conveyor at the No. 1 Mine. He also states as follows:

1. I explained to the operator why MSHA requires a clear travelway at least twenty four inches wide on both sides of all belt conveyors.
2. The operator abated the condition described in the above mentioned notice in compliance with said notice.
3. To consummate the abatement the operator cleaned one side of the belt to provide a clear twenty four inch travelway on that side. The other side of the conveyor already had a clear twenty four inch travelway at the time the notice was issued.
4. The operator was informed that it was in compliance, but no termination form was issued because no form existed for that purpose in 1975.

30 CFR 75.1403 provides as follows:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Section 75.1403-1 provides:

(a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under section 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to section 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

(c) Nothing in the sections in the section 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of imminent danger.

In support of Citations 2199892 and 2202728, Inspector Melvin relied on the previous safeguard notice issued by Inspector Wrachford, and also cited a violation of the criteria applicable to belt conveyors found in section 75.1403-5(g), which states as follows:

A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

In its posthearing brief, Monterey argues that Section 75.1403-5(g), is governed by the introductory provision found in Section 75.1403, which clearly limits its applicability to the transportation of men and materials. Since, according to Section 75.1403-1(a), section 75.1403-5(g) is simply a criterion to be used as a guide in implementing section 75.1403, Monterey suggests that although section 75.1403-5(g) employs the phrase all belt conveyors, its applicability is limited to belt conveyors used in the transportation of men and materials.

Monterey asserts that its aforementioned interpretation is generally carried out within the subsection found in Section 75.1403-5. Subsections (a), (b), (c), (d), and (e) refer to belt conveyors that are used to transport persons. Subsections (f) and (i) refer to belt conveyors that are used to transport supplies and persons. Subsection (h) refers to belt conveyors that are not used to transport persons. Only subsections (g) and (j) refer to belt conveyors without any mention of their use.

Monterey points out that it is not disputed that the belt conveyors in question transport mined coal only, and that supplies and personnel are not transported on such conveyors. Since coal is not included within the term "men," Monterey states that the question becomes whether coal is included within the term "materials." Citing a dictionary definition of the term "material" as "the substance . . . of which anything is composed or may be made," Monterey points out that section 75.1403-5 does not use the term "materials," but uses the word "supplies," indicating that the Secretary, too, interprets the word "materials" to mean "supplies." Monterey concludes that in a coal mine, coal is a product, and is not a material or supply.

Monterey asserts that there is a legitimate distinction between belt conveyors which transport men and materials, and those which transport coal only. Personnel must work on a regular basis around belt conveyors which transport men and materials (e.g., loading and unloading materials, getting on and off the belts themselves, etc.). In contrast, few personnel work around belt conveyors which transport coal only, and their work consists primarily of inspecting and maintaining the belt. The nature of one type of belt conveyor necessitates safe and easy means of access along both sides of it, while the other type of belt conveyor is satisfactorily served by safe and easy access along only one side of it.

Monterey asserts further that it is evident that the Secretary's purpose in "requiring" 24 inch clear travelways along both sides of Monterey's coal-carrying conveyor belts is to facilitate walking along both sides of the belt (Tr. 49-50), and that his motive in such purpose is to encourage examiners to walk down both sides of the belt in their examinations (Tr. 57-61).

Citing mandatory safety standard section 75.303(a), which requires preshift examination of the active workings of a coal mine, as well as onshift examinations of coal-carrying belt conveyors, Monterey points out that the extent of such onshift examinations of coal-carrying belt conveyors is not specified in the standard, and that it is not mandatory that an examiner conducting such an examination walk down both sides of the belt. Monterey concludes that for an examiner to perform his obligation it is enough that a clear travelway is maintained on only one side of the belt, and that if it is the Secretary's position that such an examination is inadequate, he should adopt, by formal rulemaking, the requirement that examiners walk both sides of coal-carrying belt conveyors and that operators provide clear travelways on both sides of such beltlines.

Monterey goes on to note that Congress also distinguished between man-carrying beltlines and coal-carrying beltlines for purposes of examination. Preshift examination is required for man-carrying belts, but only onshift examination is required for coal-carrying belts. Citing a Commission ruling in Secretary of Labor v. Jones & Laughlin Steel Corporation, 2 MSHC 2201, PENN 81-96-R, July 15, 1983, Monterey asserts that the Commission ruled in that case that coal-carrying conveyor belts per se are not "active workings."

Monterey concludes that because coal does not fall within the category "men and materials," a coal-carrying conveyor belt is not subject to section 75.1403, nor to section 75.1403-5(g). In support of this conclusion, Monterey asserts that the provisions authorizing the Secretary to require additional safeguards on a mine-by-mine basis to minimize hazards with respect to transportation of men and materials does not authorize the Secretary to require additional safeguards, such as 24 inch clear travelways, with respect to belt conveyors which carry coal only. The Secretary's authorized representative was without power to issue the Notice in question to Monterey; in the absence of such authority, the Notice is invalid. Consequently, the citations alleging violations of 30 C.F.R. Section 75.1403-5(g) for failure to comply with the Notice are also invalid.

With regard to its right to challenge the application of the safeguard notice in question, as well as the legality of the citations in question, Monterey states that the fact that it may have failed to contest two citations issued subsequent to the Wrachford Safeguard Notice in the eight years since it was issued does not foreclose its contests here, nor does it amount to an admission that the safeguard is valid. To conclude otherwise, suggests Monterey, would deprive it of its right to due process.

MSHA takes the position that the term all belt conveyors found in criteria subsection 75.1403-5(g), literally applies to all belt conveyors, regardless of whether or not they were used to transport men and materials or only coal. MSHA asserts that the term "materials" should be interpreted to include coal, and even though the parties have stipulated that the cited belt conveyors in question are not designated mantrips for the transportation of mine personnel, and that they are used solely to transport the coal which is mined out of the mine, they nonetheless must comply with the safeguard, as well as the requirements of subsection (g).

MSHA asserts that all coal conveyor belts in the mine must be provided with travelways 24 inches wide, and that such travelways must at all times be maintained "clear" on both sides of the belt conveyors. Further, on the facts of these cases, and in support of its interpretation, MSHA is of the view that both sides of all such conveyor belts must be maintained "clear" to insure ready access to both sides of the belts by belt examiners, and to preclude accumulations of loose coal which may present tripping or fire hazards, and to preclude general mine clutter which may present tripping and slipping hazards.

The "safeguard notice" authority found in section 75.1403, accords substantial power to an inspector to issue a citation on a mine-by-mine basis, for conditions or practices which are in effect transformed into mandatory health or safety standards by the inspector who may have initially concluded that a particular event or set of circumstances constituted a situation that required to be addressed in that mine. Since the practical result of an inspector's application and enforcement of a safeguard notice is to impose a mandatory safety or health requirement on the mine operator, separate and apart from any of the published mandatory standards, I believe that careful scrutiny must be given to such notices to insure proper notice and even-handed enforcement. In my view, indiscriminate or arbitrary use of such notices as "catch-alls," with little or no regard as to whether or not the asserted

violative practices or conditions sought to be addressed may constitute a violation of other specific standards, should not be tolerated. In short, I believe that due process requires that such safeguard notice be strictly construed.

In my view, the citations at issue here are a classic example of an inspector relying on a general, broad-based safeguard notice to remedy hazardous concerns which could have been cited and addressed by specific mandatory safety standards. On the facts of these proceedings, faced with accumulations of loose coal and coal dust which presented alleged fire or tripping hazards, the inspector opted to rely on a safeguard notice issued some seven years earlier by another inspector to achieve compliance which could have directly and effectively been dealt with by citing the specific mandatory standards intended to cover those particular conditions.

The Secretary's Inspector's Manual, March 9, 1978 edition, at pages II-583, states the following policy interpretation for an inspector to follow when relying on a safeguard notice issued pursuant to section 75.1403:

These safeguards, in addition to those included as criteria in the Federal Register, may be considered of sufficient importance to be required in accordance with section 75.1403.

It must be remembered that these safeguards are not mandatory. If an authorized representative of the Secretary determines that a transportation hazard exists and the hazard is not covered by a mandatory regulation, the authorized representative must issue a safeguard notice allowing time to comply before a 104(a) citation can be issued. Nothing here is intended to eliminate the use of a 107(a) order when imminent danger exists. (Emphasis added).

Sections 75.1403-2 through 75.1403-11 set out the criteria by which an inspector will be guided in requiring other safeguards on a mine-by-mine basis under section 75.1403. Criteria 75.1403-2, deals with brakes on hoists and elevators used to transport materials. Criteria 75.1403-3 deals with drum clutches on man-hoists, and hoist ropes and cage construction on devices used to transport mine personnel. Criteria 75.1403-4 deals with automatic elevators, including requirements for an effective communication system. Although the criteria do not mention materials or personnel, one can logically assume that given the appropriate circumstances, they apply to both.

The criteria found in section 75.1403-5(a) through (f), and (h) through (j), all specifically include a reference to the transportation of personnel on belt conveyors. Subsection (f) provides that after supplies have been transported on belt conveyors, they are to be examined for unsafe conditions prior to transporting men on regularly scheduled mantrips, and that they are to be clear before men are transported. The only specific reference to conveyors that do not transport men is found in subsection (h) which requires that such belt conveyors be equipped with properly installed and accessible stop and start controls installed at intervals not to exceed 1000 feet.

Subsection (g) of the criteria found in section 75.1403-5, require clear travelways at least 24 inches on both sides of all conveyor belts installed after March 30, 1970. It also contains a provision that "where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor." Thus, while the first sentence seems to require clear 24 inch wide travelways on both sides of all conveyors, the second sentence seemingly contains an exception where roof supports are installed within 24 inches of a belt conveyor. In such a situation, the second sentence seems to require that only the outby side of the belt conveyor be provided with a clear 24 inch wide travelway. Given this somewhat confusing exception, I would think that in cases where it is established that roof supports are present within 24 inches of a belt conveyor, an operator would only be required to maintain one side of the belt as a clear travelway of 24 inches in width. It would further appear to me that the question as to whether which side of the belt conveyor has to be maintained as a clear travelway would depend on the location of the roof supports.

The statutory requirements found in mandatory section 75.303, for the conduct of preshift examinations includes a requirement for examination of "active roadways, travelways, and belt conveyors on which men are carried, . . . and accessible falls . . . for hazards." This section mandates that the examiner examine for such other hazards and violations of the mandatory health of safety standards, as an authorized representative of the Secretary may from time to time require.

With regard to the preshift requirements for examination of belt conveyors on which coal is carried, section 75.303 mandates that they be examined after each coal-producing shift has begun. This section also mandates that if the examiner finds a condition or practice which constitutes a violation of a

mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such areas, he is required to post any hazardous area with a "danger" sign, and then proceed to take corrective action.

The Secretary's Inspector's Manual, edition of March 9, 1978, pgs. II-241-242, containing the policy interpretation for enforcement of section 75.303, has absolutely no reference to a requirement that conveyor belts have 24 inches of clear walkways. As a matter of fact, the reference to examination of travelways states that "every foot of roof along the entire length of the travelway" is not required to be tested. It goes on to state that roof and ribs along travelways "shall be examined visually," and "doubtful places" are to be tested to assure corrections of hazardous conditions.

The Secretary's policy inspection guidelines found at pgs. II-244 and II-245 with respect to section 75.304 onshift examinations for hazardous conditions, while including travelways, do not contain any requirements for 24 inch clear travelways. However, the policy does require an inspector to cite violations of mandatory health or safety standards when observed by citing section 75.304, in addition to the specific mandatory standard covering the specific hazard.

Taken as a whole, the statutory, regulatory, and policy interpretations which address belt conveyor travelways specifically distinguish between belt conveyors which transport men and supplies from those which transport only coal. In addition to the specific criteria previously discussed, I take note of the fact that the criteria dealing with mantrips (75.1403-7) specifically address supplies or tools (subsection (k)), tools, supplies, and bulky supplies (subsection (m)), extraneous materials or supplies (subsection (o)), and that the criteria dealing with track haulage, 75.1403-8(b), specifically deals with the maintenance of continuous track haulage clearances of at least 24 inches from the farthest projection of normal traffic. Viewed in context, and taken as a whole, I believe that the clear Congressional intent in promulgating the safeguard requirements found in section 75.1403 was to do precisely what that section states, namely to minimize hazards with respect to the transportation of men and materials other than coal. It occurs to me that had Congress had in mind coal, it would have simply included the transportation of coal as part of the regulatory language, and MSHA would have included this as part of its regulatory criteria. Since Congress and MSHA failed to do so, I reject any notion that I should include this interpretation as part of my findings in this matter.

On the facts of this case, MSHA seeks to address certain perceived tripping and fire hazards which may have resulted from the failure by the mine operator to clean up coal accumulations resulting from the normal mining process, or roof falls, or by the failure by the operator to remove general mine materials from the travelways. Given these concerns, I believe that it is incumbent on MSHA to either promulgate specific standards to address these concerns, or to amend its criteria to state precisely what it has in mind. Requiring this particular mine operator to maintain 24 inch wide clear travelways along both sides all of its belt conveyors under the guise of a safeguard notice issued eight years ago, with no credible evidentiary support for its position is simply unsupportable.

The citations which are at issue here (2202728 and 2199892), charge the respondent with a failure to maintain a clear travelway on the east side of the cited belt conveyors in question. This leads me to conclude that it was altogether possible that the south side of the conveyor belts were in compliance, and what really concerned Inspector Melvin was the fact that failure to maintain the east sides of the belts did not comport with the safeguard requirements that both sides of the belt conveyor be maintained clear of coal accumulations and other debris. However, given the confused testimony and evidence presented by MSHA to support its case, I simply cannot conclude that MSHA has proven its case. This is particularly true when it seems obvious to me that the inspector's concerns over accumulations of loose coal and extraneous material could have been addressed by specific citations of the mandatory requirements dealing with those specific hazards. In short, Inspector Melvin should have followed MSHA's policy directives to cite the specific mandatory standards dealing with coal accumulations and tripping or guarding hazards, rather than relying on a safeguard notice issued some eight years earlier.

While one may conclude that the presence of the materials described by Inspector Melvin in Citation No. 2202728 (rocks, roof bolts, concrete blocks, etc.), and Citation No. 2199892 (loose coal which may have spilled over on to the travelway), support a conclusion that the cited travelways were not maintained "clear," unless it can be shown that these conditions constituted a violation of the cited regulations, the citations must be vacated.

After careful consideration of all of the testimony and evidence adduced in these proceedings, including the arguments

advanced by the parties in support of their respective positions, I conclude and find that Monterey has the better part of the argument as to the application of section 75.1403-5(g) to the cited belt conveyors in question. Accordingly, I conclude and find that the overall statutory and regulatory intent of the cited section is to address hazardous conditions connected with belt conveyors which transport men and materials other than coal, and that any logical interpretation of this section necessarily excludes coal as a "material" within the scope of the cited criteria. I accept and adopt Monterey's proposed findings and conclusions with respect to the interpretation and application of this section as my findings and conclusions, and I reject those advanced by MSHA. The citations are VACATED.

Findings and Conclusions

LAKE 83-52 - Fact of Violation

In this case, Citation No. 2036802, issued by Inspector Melvin on December 28, 1982, charges the respondent with a "significant and substantial" violation of mandatory standard section 75.316, for failure by the respondent to follow the applicable provision of its mine dust control plan. Inspector Melvin found that certain exhaust ventilation tubing located in an area where a continuous mining machine was loading coal was extended 22 feet outby the face. The applicable dust plan requires such exhaust tubing to be maintained within 10 feet of the face as the face is advanced.

Mandatory safety standard section 75.316, requires a mine operator to adopt a suitable mine ventilation and dust control plan for its mine. Once approved by MSHA, that plan becomes the applicable plan required to be followed until such time as it is revised, revoked, or otherwise changed. It is clear that a violation of the plan is a violation of the requirements of section 75.316.

The respondent has stipulated to the conditions cited by the inspector, including the fact that the continuous mining machine was loading coal at the cited location, and that the exhaust tubing was approximately 22 feet outby the face. Respondent has also stipulated to the applicable dust and ventilation provision which requires that such tubing be maintained within 10 feet of the face, and in its posthearing brief "does not deny that this condition existed in the cited section of the mine" (pgs. 2-3, brief). Respondent also admits that the violation occurred (pg. 1, brief), and only challenges the inspector's "significant and substantial" (S&S) finding.

In view of the foregoing, I conclude and find that the petitioner has established the fact that a violation of section 75.316 occurred, and to this extent the citation IS AFFIRMED.

LAKE 83-61 - Fact of Violation

In this case, Citation No. 2063916, issued by Inspector Gully, charges the respondent with a "significant and substantial" violation of mandatory standard section 75.316, for failure by the respondent to follow a specific provision of the applicable mine ventilation plan in that at the cited location detailed in the citation where a continuous miner was cutting coal, the amount of measured air was only 1900 CFM. The ventilation tubing provided at this location was 390 feet from the fan. The applicable plan provision requires a minimum air quantity of 5000 CFM where the ventilation tubing is in excess of 370 feet.

Mandatory safety standard section 75.316, requires a mine operator to adopt a suitable mine ventilation and dust control plan for its mine. Once approved by MSHA, that plan becomes the applicable plan required to be followed in the mine until such time as it is revised, revoked, or otherwise changed. It is clear that a violation of the plan is a violation of the requirements of section 75.316.

The respondent has stipulated to the conditions cited by the inspector, including the fact that the continuous mining machine was cutting coal, that the tubing length was 390 feet, and that the air measurement made by the inspector in support of the citation was in fact 1900 CFM. Respondent also stipulated as to the applicable ventilation plan requirements, and in its posthearing brief "does not deny that the condition existed in the cited section of the mine at the time the citation was issued" (pg. 2, brief). Respondent does not deny that the violation occurred (pg. 8, brief), and only challenges the inspector's "significant and substantial" (S&S) finding.

In view of the foregoing, I conclude and find that the petitioner has established the fact that a violation of section 75.316 occurred, and to this extent the citation IS AFFIRMED.

Significant and substantial issue

During the course of the hearings in these proceedings, I raised the issue as to the reviewability of "special findings," such as an alleged "significant and substantial" violation,

in a civil penalty proceeding. In a prior proceeding now on review with the Commission, Secretary of Labor v. Black Diamond Coal Mining Company, SE 82-48, April 20, 1983, I refused to review such findings. In Secretary of Labor v. Glen Irvan Corporation, PENN 83-27 and PENN 83-146, November 3, 1983, I rejected any notion that the Secretary's Part 100 "single penalty" assessment regulations were binding on a Commission Judge. In rejecting a "non-S&S" \$20 penalty assessment, I considered the facts and circumstances surrounding that particular violation de novo, and assessed an increased civil penalty on the basis of my gravity findings. In short, I considered the matter of "S&S" in the context of gravity.

In its posthearing brief, Monterey cites a plethora of precedent cases decided by Commission Judges in which special "S&S" findings were reviewed. Counsel states that my Black Diamond decision, and a decision by Judge Melick in Windsor Power House Coal Company v. Mine Workers, 1 MSHC 2484, WEVA 79-199-R and WEVA 79-200-R, July 3, 1980, stand "in stark contrast" to the other decisions holding that special findings may be reviewed within the context of a civil penalty contest. I am overwhelmed by this "weight of authority," and while I realize that consistency dictates that I rule otherwise, I will consider the special findings made by Inspector Melvin in these proceedings.

As I have noted in several prior decisions concerning the application of the Commission's holding in Cement Division, National Gypsum Co., the issue of reviewability of special findings in the context of civil penalty proceedings was not directly raised or addressed by the parties in that case. The parties apparently assumed that such findings could be reviewed, and the Commission itself noted that its interpretation of the phrase "significant and substantial" was made "in the context of a civil penalty proceeding." It did not specifically rule on the issue of reviewability because that issue was apparently not specifically articulated on the record. In any event, I take note of the following interpretation of the term "significant and substantial" made by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), aff'd in Secretary of Labor v. Consolidation Coal Company, decided January 13, 1984, WEVA 80-116-R, etc. affirming a prior holding by a Commission Judge, 4 FMSHRC 747, April 1982:

[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts

surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

In its most recent holding in Consolidation Coal Company, WEVA 80-116-R, etc., January 13, 1984, the Commission stated as follows at pg. 4, slip opinion:

As we stated recently, in order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., FMSHRC Docket No. PENN 82-3-R, etc., slip op. at 3-4 (January 6, 1984).

In its posthearing brief, Monterey cites the National Gypsum holding that a violation is "significant and substantial" if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Relying on this interpretation Monterey asserts that the requirement in section 75.316 of a ventilation, methane and dust control plan is intended to minimize the risks of lung disease such as pneumoconiosis due to prolonged exposure to excessive levels of respirable coal dust, and of explosion or ignition due to the buildup of methane or other gasses. Conceding that there is no question that pneumoconiosis or injuries resulting from an explosion would be "of a reasonably serious nature," Monterey states that the proximity of such injury or illness is the issue here. It concludes that in order for a violation of the required plan to be significant and substantial, the Secretary must show by the particular facts surrounding the violation that it was reasonably likely to result in pneumoconiosis or in an explosion.

In support of its conclusion that the violations are not "significant and substantial," Monterey asserts that the Secretary has failed to satisfy the burden of proof required

by the National Gypsum holding and has established nothing more than the fact that violations of section 75.316 occurred. Monterey asserts that the Secretary has not shown that the violations of its dust and ventilation plan resulted in any excessive level of respirable dust or in any accumulation of methane, nor has the Secretary even alleged any other facts which might indicate that contraction of pneumoconiosis or an explosion was reasonably likely to result from the violations.

Monterey points out that respirable dust and methane limits are specifically set in other standards. The limit for respirable dust is found in section 70.100(a), which provides that "each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere . . . at or below 2.0 milligrams of respirable dust per cubic meter of air" The limit for methane is found in section 75.316-2, which provides that "the methane content in the air in active workings shall be less than 1.0 volume per centum." Monterey states that neither of these limits was exceeded in the cited areas of the mine at any relevant time.

Monterey suggests that it would be a legal anomaly for a violation of ventilation, methane and dust control plans required by section 75.316, the purpose of which is to control respirable dust and methane levels, to be significant and substantial in spite of the fact that the specific limits for these substances established by sections 70.100(a) and 75.316-2 were not exceeded. Such a conclusion would totally disregard the fact that in adopting said standards the stated limits were deemed to be not unsafe, and would be tantamount to superseding the formally-adopted safety or health standards.

Monterey cites Judge Melick's decision in Consolidation Coal Company v. Secretary of Labor, 2 FMSHRC 1896, August 18, 1982, in which he ruled that two alleged violations of the respirable dust standards found in section 70.100(a), where a production unit had respirable dust levels of 2.5 and 2.7 milligrams per cubic meter of air, were not significant and substantial. Judge Melick's ruling was based on his finding that in the absence of medical or scientific evidence correlating exposure of miners to violative respirable dust levels of 2.5 and 2.7, he could not conclude that the violations were significant and substantial. Monterey asserts that with respect to the citations issued by Inspector Melvin, there is no evidence that the respirable dust levels in the cited areas of the mine at the relevant time ever approached

2.5 or 2.7. Further, Monterey states that the Secretary has proffered no medical or scientific evidence that the exposure of miners to the actual respirable dust level existing at the cited areas at the relevant times is correlated to pneumoconiosis, which evidence is required by Consolidation Coal for a violation to be significant and substantial.

In addition to its Consolidation Coal arguments, Monterey maintains that on the facts of these citations, there are other factors to consider in support of its conclusion that the violations were not significant and substantial. These include the fact that the miners were not, in fact, exposed to any hazardous levels of respirable dust or methane. The duration of the violation would have been negligible, even if the citations had not been issued; normal operating procedures would have led to the detection and correction of the violations in a short period of time. The number of people "exposed" was low. A number of redundant safeguards continued to control respirable dust and methane. The mine history itself indicates that Monterey has been very successful in controlling respirable dust and methane.

In conclusion, Monterey asserts that the Secretary's inferences are too speculative to serve as a basis for a finding that the violations in question were significant and substantial. As an example of the speculativeness of the Inspector's finding that Citation No. 2036802 (LAKE 83-52) was significant and substantial, counsel attaches a copy of a citation issued three weeks later alleging nearly identical facts but not finding the alleged violation to be significant and substantial. The citation (exhibit R-1), was issued by Inspector Melvin on January 20, 1983, No. 2036818, and it charges a violation of section 75.316 for failure to follow the mine dust control plan. Inspector Melvin found that in the cited mine area where a continuous mining machine had been loading coal, the ventilation exhaust tubing was extended 20 feet outby the face, and that this violated the plan requirements that such tubing be maintained to within 10 feet of the face.

Monterey also cites a May 19, 1981, MSHA Policy Memorandum, which states that in determining whether a violation is significant and substantial, "it is not enough to find that an injury or illness is only possible." Monterey then concludes its arguments by asserting that it is inescapable that the designation of the violations in question as significant and substantial is both unsupported by the particular facts surrounding the violations and legally erroneous.

In support of its position on the question of "significant and substantial," MSHA relies on the National Gypsum Commission decision definition. With regard to the specific facts surrounding Citation No. 2036802, MSHA quotes the condition described by the inspector on the face of the citation, and points out that the parties have stipulated to the accuracy of these findings. In this regard, I take note of the fact that the citation merely states a conclusion that positioning the exhaust tubing 22 feet outby the face violated the applicable dust control plan provision which requires that such tubing be maintained within 10 feet of the face as the face is advanced.

Turning to the testimony of the inspector in support of his conclusion that the violation was "significant and substantial," MSHA points to the inspector's testimony, supported by a witness for Monterey (Mottershaw), that the purpose of maintaining the tubing within 10 feet of the face is to keep respirable dust away from the face and to remove methane gas. The inspector stated that locating the tubing 22 feet from the face is not half as effective as is maintained within the required 10 feet, and he believed that the tubing remained at the 22 feet distance for approximately 20 minutes. The inspector also stated that he was told by certain miners that the tubing is initially placed where the cutting of coal is begun, and that it is not extended until the cutting is finished. However, since he believed these statements to be hearsay, he discounted issuing a "willful" citation, but believed they were truthful because none of the miners made any effort to place the tubing in the proper position even though they knew he was inspecting the area.

MSHA suggests that the inspector's belief that not moving the tubing in question was the usual procedure at the mine was also based on his testimony that he had issued other citations in the past at the mine for the same violations. Although he stated that he had previously cited the same conditions in other sections of the mine "more than once," no additional evidence or testimony was forthcoming to support this assertion. However, as part of his posthearing arguments, MSHA's counsel cites 18 prior violations of section 75.316 from January 8, 1981 to November 16, 1982, as reflected in the history of prior violations attached to the stipulations, to support a conclusion that Monterey has not been greatly concerned with the enforcement of its ventilation and methane plans.

In response to Monterey's assertion through testimony of its witnesses that the mine has water equipment and other

equipment to control the dust; that the continuous miner has a device that stops that machine when the level of methane is high; and, that the level of methane was low at the time of the inspection, MSHA's counsel points out that this equipment is standard equipment found in every mine and is not a substitute for the proper placement of the exhaust tubing near the face. Counsel concludes that Monterey creates a dangerous situation when it decides to relax enforcement of its dust and methane plans because it is confident that the methane level is low and that some devices in the mine are going to control the respirable dust, methane, and other gases.

MSHA points out further that the mine was on a five-day section 103(i) spot inspection cycle the time the citation issued, and that this was because it was liberating extremely high quantities of methane or other explosive gases in excess of one million cubic feet during a 24-hour period. Although a witness for the Monterey testified that at the time of the hearing the inspections had been changed to 1-day spot inspections, counsel argues that to assume that an ignition is not going to happen because the methane level is low at a particular moment is to rely on a false sense of security. Counsel maintains that it is a fact that in a mine that liberates an excess of one million cubic feet of methane in a 24-hour period the methane level can go up at any time, significantly increasing the likelihood of an ignition and resulting in serious injuries or death.

MSHA asserts that the facts in this case prove that the methane levels could have increased due to improper positioning of the exhaust tubing, and that excessive amounts of respirable dust could have increased because of this condition. MSHA suggests that it is a well known fact that serious injuries or death could result in case of a fire or explosion caused as a consequence of high levels of methane, and that pneumoconiosis can be caused by exposure to respirable dust. MSHA concludes that while it has no burden to prove the existence of an imminent danger situation, this would have been the case if at the time of the inspection the methane level had reached the explosion level and the device to detect that gas had not been in operation.

MSHA suggests that the facts presented at the hearing clearly prove that an injury or an illness of a reasonable serious nature could have resulted as a consequence of the hazard presented by the condition described in this citation, and that this meets one of the tests required to prove the existence of a significant and substantial condition. The other test to prove the existence of the significant and

substantial element in a violation is to show that a reasonable likelihood exists that the injury or illness in question would occur. MSHA concedes that we are dealing here with a probability factor, but states that the test does not require an absolute certainty that the injury or illness must occur.

In addition to the evidentiary support for its position, MSHA relies on the past history of violations at the mine and question and considers that history as an important factor in the evaluation of the probability of an accident. MSHA maintains that it is reasonable to assume that the probability of an accident is increased by the increase of the exposure of the miners to a specific condition, and that the exposure is increased by the number of violations involving that same condition that occurs in a particular mine. Recognizing that the definition of significant and substantial requires that the likelihood of an accident be based on the particular facts surrounding the violation, MSHA's position is that the history of violations of a specific standard is a fact which surrounds the violation of such standard, and that this fact cannot be separated from the violation when an evaluation is made to determine the likelihood of an accident as a result of said violation.

In support of the "S&S" finding made by Inspector Gulley with respect to Citation No. 2063916, MSHA relies on his posthearing affidavit, which in pertinent part states as follows:

I determined that the cited condition was of a significant and substantial nature because a reasonable likelihood existed that injuries of a reasonably serious nature would have occurred as a result of said condition for the following reasons.

(a) The methane level was 0.2% 15 feet out-by the face on the right side and 0.3% on the left side. However, it could have been higher at the face where I did not measure it because the roof was unsupported.

(b) Monterey Mine No. 1 liberated more than one million cubic feet of methane or other explosive gases during a 24-hour period as of February 3, 1983.

(c) Monterey Mine No. 1 was under a five day spot inspection under Section 103(i) of the Act as of February 3, 1983.

(d) The methane level could have built up at the face at any time causing an ignition and resulting in burns on the body and face of the two operators of the continuous miner:

(e) The injuries produced by a gas ignition could have resulted in lost work days or restricted duty.

(f) The amount of air found at the time of the inspection was 1900 cubic feet per minute where 5000 cubic feet per minute was required by the operator's ventilation plan. This lack of air contributed to the increase in methane gas and respirable dust and increased the exposure of miners to the hazards caused by high methane levels and respirable dust.

(g) I was informed by the operator that the air quantity had been measured before the inspection and found to be adequate. However, I found that the air had been measured with an anemometer and that the miner who measured it was not familiar with air measuring procedures.

(h) Based on the history of many prior violations by the operator of 30 CFR 75.316, I considered that the likelihood of an accident caused by an increase in the methane level as a result of poor enforcement of the operator's ventilation plan was augmented.

MSHA points out that Monterey's witness Mottershaw testified that the decreased airflow measured by Inspector Gulley was the result of a rock dust bag being sucked into the tubing, thereby interrupting the airflow, and that empty rock dust bags are used to repair and patch ventilation leaks in the tubing. Coupled with the history of prior violations, MSHA suggests that this practice of using rock dust bags to repair ventilation leaks establishes poor enforcement of the mine ventilation and dust control plans. MSHA points out that no one knows how long the rock dust bag may have interrupted the ventilation, and that the 1900 cubic feet of air found by Inspector Gulley was not a minor decrease, particularly where the required 5000 cubic feet is only a minimum requirement. Coupled with the prior history of poor enforcement of section 75.316, MSHA concludes that a reasonable likelihood existed that an injury or illness of a reasonable serious nature would have resulted as consequence of the condition cited.

Monterey's history of prior violations is in the form of computer print-outs attached as Exhibit B to MSHA's post-hearing arguments. The print-out detailing Monterey's prior history for the period December 28, 1982 to June 21, 1983, lists five citations for violations of section 75.316. Two of the listed violations are the ones contested in these proceedings. The three remaining ones concern violations issued on January 20, February 1, and April 19, 1983. In each instance, the print-out reflects that Monterey paid the "single penalty" assessment of \$20 for each of the violations. I take note of the fact that these "single penalty" assessments are based on findings that they are "non-S&S" violations.

A second computer print-out, also identified as Exhibit B, covers the period December 28, 1980 through December 27, 1982. It lists 18 prior violations of section 75.316, and the penalty assessments range from a low of \$20 to a high of \$275. Three of the citations were "single penalty assessments" of \$20 each, and according to the computer "codes," the remaining penalty assessments were "regular assessments," as distinguished from assessments related to injuries, fatalities, or unwarrantable failures. Further, all of the citations were section 104(a) citations, and did not involve withdrawal orders or imminent dangers. Taken as a whole, the computer print-outs reflect that for a period spanning December 28, 1980 through June 21, 1983, Monterey was assessed for 21 violations of section 75.316, six of which were \$20 "single penalty" "non-S&S" assessments.

Absent any testimony or documentation as to the specific conditions or practices which prompted the prior citations, I cannot conclude that they involved the same conditions cited in these proceedings. Given the fact that section 75.316 is a general standard requiring a mine operator to adopt a ventilation system, and methane and dust control plans approved by the Secretary, unless MSHA produces the specific citations, as well as the particular plan provisions which may have been applicable at the time these prior citations were issued, I cannot conclude that they involved a failure by Monterey to follow the plan provisions dealing with ventilation tubing or the maintenance of air velocity at the level at issue in these cases.

On the facts of these proceedings, MSHA's reliance on the history of prior violations to support a conclusion that Monterey has somehow engaged in a practice of deliberately flaunting its own dust and ventilation plans is rejected. Given a two and half year period of 21 violations of section 75.316 violations, six of which were "non-S&S" violations, and given the fact that Monterey is a large mine operator, I

cannot conclude that MSHA's conclusions are supportable. This is particularly true where MSHA has produced absolutely no facts to indicate precisely what the conditions or practices cited in these prior violations were all about. As an example, I cite Monterey's reference to Inspector Melvin issuing a subsequent "non-S&S" citation for precisely the same conditions for which he now claims constitute a significant and substantial violation.

In my view, if it can be established that a mine operator has a practice of deliberately flaunting the law, this should be addressed by the issuance of closure orders or the institution of criminal proceedings. The issuance of inconsistent and unexplained section 104(a) citations, some of which are "S&S," and some of which are not, all based on identical factual situations, simply does not make sense. Further, reliance on unevaluated prior histories of violations, with no documentation, also do not make sense.

If MSHA is of the view that past history violations, as well as information of asserted practices which may suggest a lack of attention to dust and ventilation plans, may support a theory of "significant and substantial" violations, it is incumbent on MSHA to support those conclusions by credible evidence, rather than by speculative unsupported theories. As an example, I cite Inspector Melvin's testimony that certain miners told him that as a matter of routine or practice, the exhaust tubings are not advanced to within 10 feet of the face as mining advancing. Where are the miners to support this conclusion? I also cite MSHA's reliance on computer print-outs, with absolutely no testimony or evidence to indicate the particular facts or circumstances which prompted those citations.

Turning to the record evidence to support MSHA's assertion that Citation No. 2036802 was significant and substantial, I take note of the fact that Inspector Melvin testified that his methane readings taken 20 to 22 feet from the face at the time the citation issued ranged from .1 to .2, and that these were "not high" (Tr. 8). He also indicated that while readings of .5 may have caused him concern, gas is generally not detected at the face in the mine (Tr. 11). He conceded that even though the mine is classified as a "gassy mine," and even though methane may be encountered when the coal is actually cut, he has not detected methane levels in excess of the prohibited standards (Tr. 12-13). Further, he did not rebut the testimony of Monterey's witness Mottershaw that in all the years he has worked at the mine, the mine had never been cited for excessive levels of methane, and he conceded that at the time he issued the citation, he detected

no excessive methane (Tr. 26). Nor did the inspector rebut the testimony of mine manager Lehmann that his examination of the preshift examiner's books for the cited mine unit for the entire month of December 1982, reflected "zero methane readings" (Tr. 85).

With respect to the methane monitor on the cutting machine in question, Inspector Melvin stated that he found nothing wrong with it, and his concern was with the possible build-up of methane (Tr. 20,22). He candidly stated that he made his "S&S" finding on the ground that "if it continues to happen you could have a build-up of methane" and "sooner or later someone will be injured" (Tr. 24). He also expressed reservations about finding an "S&S" violation for such a condition "if it were the first time" (Tr. 26). He also confirmed that he found nothing wrong with the cutting machine, and issued no other violations (Tr. 38), and that at the most, the ventilation tubing would have been at the 22 foot location for no more than 20 minutes.

With regard to the question as to whether the respirable dust levels in the mining unit which he cited exceeded the permissible levels, Inspector Melvin testified that he could not state what those levels were, and that he did not take any samples, nor did he check any sample results which may have been taken by Monterey (Tr. 28). Further, even though Monterey's history of prior citations, as reflected by the computer print-outs, reflect prior citations for violations of the respirable dust requirements of section 70.100(a), no testimony or evidence was forthcoming as to any of the details of those violations.

In view of the foregoing findings and conclusions, I cannot conclude that MSHA has established that the violation in question was significant and substantial. Given the short duration that the exhaust tubing was 22 feet from the face, as well as the fact that the low level of methane and the condition of the methane monitor and machine were in compliance with other applicable standards, a finding of significant and substantial is unsupportable. Accordingly, that portion of the citation alleging a significant and substantial violation IS VACATED.

With regard to Citation No. 2063916, I conclude and find that MSHA has established that it was a "significant and substantial" violation. I agree with MSHA's arguments that the interruption to the ventilation flow resulted in a significant decrease in the amount of air required to be maintained where coal was being cut. This marked decrease in air presented a substantial hazard to the miners working

in the cited area, particularly where the facts here show that the interruption to ventilation was caused by a rock dust bag used to make repairs to the ventilation tubing. Given the fact that the ventilation tubing was 390 feet from the fan, the practice of using such rock bags to make such repairs presented a reasonable likelihood that ventilation would be interrupted at those points where such bags were used, and that if sucked into the tubing, it would go undetected.

The practice of repairing the tubing by the use of empty rock dust bags was established by Monterey's own witness, and he apparently was aware of the fact that miners would often make repairs in this manner. While I recognize that the methane readings found by Inspector Gulley outby the face were low, and that he took none at the immediate face, the fact is that the violation occurred while coal was being cut, and the interrupted ventilation caused by the practice of using rock bags to make repairs to the tubing, presented a significant and substantial hazard to miners. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business.

The parties have stipulated that Monterey is a large mine operator and that the payment of the assessed civil penalties will not adversely affect its ability to remain in business. I adopt these stipulations as my findings and conclusions.

History of Prior Violations

Monterey's history of prior violations has been previously discussed. Aside from MSHA's failure to present any specific information concerning prior violations of section 75.316, MSHA presents no arguments dealing with Monterey's overall compliance history, and whether or not that history warrants any additional increases in the penalties to be assessed in these proceedings.

I note that MSHA's computerized print-out for the two-year period of 1980-1982, reflects approximately 347 violations, and that for the prior 1982-1983, the print-out reflects 98 violations, all issued at the No. 1 Mine. I have considered this information in assessing the penalties in these proceedings. However, I believe it is incumbent on MSHA to establish any correlation between an operator's past track record and an increase in civil penalties on the basis of that record. MSHA's continued practice and reliance on unevaluated computer print-outs, with no further supporting arguments, should be reexamined if the Secretary seriously expects any increased civil penalties on the basis of continued noncompliance.

Good Faith Compliance

The parties have stipulated that Monterey demonstrated good faith in abating the conditions cited in Citations 2036802 and 2063916, and I adopt this stipulation as my finding and conclusion as to these citations.

Gravity

I conclude and find that Citations 2036802 and 2063916, were both serious violations. Although the exhaust tubing violation was found to be "non-S&S," and while it was unlikely that an accident would have occurred within the relatively short period that the tubing was 22 feet from the face, these are factors which go to the degree of the severity of the situation, and may not serve to establish that the violation was nonserious. In short, I find that while Citation 2036802 did not involve a significant and substantial violation, noncompliance with the cited standard was serious.

With regard to Citation 2063916, I conclude and find that this was a serious violation in that the air present where the machine was cutting coal was substantially reduced due to the interrupted air flow in the ventilation tubing. Such an occurrence could easily reoccur and go undetected because using rock dust bags to make repairs on the tubing could easily result in the bags being sucked into the tubing without anyone knowing it.

Negligence

Citation No. 2036802

Monterey concedes that it violated the applicable dust and ventilation provision which prompted the inspector to issue the citation in question. A mine operator is presumed to know the contents of his own plans, and the facts in this case establish that Monterey knew or should have known of the conditions cited by the inspector. Accordingly, I conclude and find that the violation resulted from a high degree of negligence and this is reflected in the civil penalty assessed by me for this violation. As an aside, had MSHA produced any credible testimony that the miners made it a practice not to advance the ventilation tubing as required by the plan, I would find gross negligence and would have increased the penalty assessment substantially.

In this case, Monterey concedes that the use of empty rock dust bags for makeshift repairs to ventilation tubing is often done by the workmen on the section. Mr. Mottershaw's testimony indicates that rock dust bags, rather than plastic material manufactured for the specific purpose of making such repairs, are routinely used by miners. Monterey's counsel stated during the hearing that "its probably not a one time only occurrence." Under the circumstances, I conclude and find that this violation resulted from gross negligence. Routinely making such repairs with empty rock dust bags rather than the materials specifically manufactured for such purposes indicates to me that Monterey in this instance failed to exercise the slightest degree of care. While it is altogether possible that mine management was unaware of this practice, I cannot conclude here that this is the case. Mr. Mottershaw is the company safety coordinator, and his testimony indicates prior knowledge of this practice.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of Section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Docket LAKE 83-52

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2036802	12/28/82	75.316	\$300

Docket LAKE 83-61

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2063916	2/3/83	75.316	\$850

ORDER

Respondent Monterey Coal Company IS ORDERED to pay the penalties assessed by me, as shown above, within thirty (30) days of the date of these decisions and Order, and upon receipt of payment by MSHA, the cases are dismissed.

Findings and Conclusions

Docket No. LAKE 84-17

This case involves a "non-S&S" Section 104(a) Citation No. 2319281, issued by MSHA Inspector George J. Cerutti


on August 9, 1983. The citation charges respondent Monterey Coal Company with a violation of 30 CFR 75.1403-5(g), and the inspector cited the September 4, 1975, Safeguard Notice issued by Inspector Wrachford. The "condition or practice" cited is as follows:

A clear travelway at least 24 inches wide wasn't provided along the Main North Belt Conveyor on the east side of the belt at the following location of Rock and Clay at these crosscuts. 198 to 202, 194-193, 192-193, 190-191, 188-189, 186-180, 177-178, 176-175, 171-170, 165-164, 161, 160, 158-159, 156-157, 154-153, 154-153 [sic], 151-150, 148-149, 147-146, 151-150 [sic], 148-149 [sic], 146-147, 140-139, 130-131, 112-109, 110-108, 107-106--west side 99-100, 93-94, 90.

Respondent's motion to consolidate this case with the preceding cases concerning basically the same factual and legal issues was granted by me by Order issued on January 3, 1984. Respondent does not dispute the conditions or practices described by the inspector, waived its right to a hearing, and agreed that all prior stipulations and agreements concerning the preceding dockets are equally applicable in this case. Further, respondent advances the same legal defenses in this case as it did in the prior cases, and I assume that MSHA's position would also be the consistent with its arguments in the prior cases.

ORDER

My findings and conclusions with respect to the interpretation of section 75.1403-5(g), as well as the application of that standard and the safeguard notice to the belt conveyor walkways in question in the prior dockets are equally applicable in this case. Accordingly, they are incorporated herein by reference as my findings and conclusions in this case. Under the circumstances, Citation No. 2319281 IS VACATED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 24, 1984

HELVETIA COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. PENN 83-229-R
v.	:	Citation No. 2111785; 8/5/83
	:	
SECRETARY OF LABOR,	:	Lucerne No. 8 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Jerome H. Simonds, Esq., Freedman, Levy, Kroll & Simonds, Washington, D.C. and William M. Darr, Esq., Indiana, Pennsylvania, for Contestant; Catherine Oliver Murphy, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a notice of contest originally filed by Helvetia Coal Company for review of a citation dated August 5, 1983, issued by an inspector of the Mine Safety and Health Administration (hereafter referred to as MSHA) under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a), alleging a violation of 30 C.F.R. § 75.200, incident to a roof fall which killed a miner. The citation was vacated on September 12, 1983. Pursuant to a motion to withdraw filed by the operator on September 20, 1983, I dismissed the case on October 5, 1983.

On October 26, 1983, the citation was modified to restore the original citation and change it to one issued under section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1). The operator again filed a notice of contest. The Solicitor filed an answer asserting the citation was properly issued under section 104(d)(1). By Notice of Hearing dated December 6, 1983, I set the case for hearing on February 1, 1984, and directed the filing of prehearing statements. Both parties filed such prehearing statements.

Thereafter on January 26, 1984, the Solicitor advised me by telephone that MSHA again had decided to vacate the citation. Because MSHA's actions were so unusual I directed both parties to appear at the hearing as scheduled. At the hearing the Solicitor submitted a notice dated January 30, 1984, vacating the section 104(d)(1) citation. In addition, five MSHA officials testified. The operator appeared but submitted no evidence.

30 C.F.R. § 75.200, which appears in the Act as section 302(a), 30 U.S.C. § 862(a) provides as follows:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

Citation No. 2111785 dated August 5, 1983, describes the violative condition or practice as follows:

The roof in the working place of the No. 3 entry of 2 Left South Mains 017 working section was not being adequately supported or otherwise controlled to protect the miners under the supervision of Steve Lenosky, Section Foreman, in that additional safety precautions were not taken to assure the safety of the miners after a bad roof condition was observed by the Section Foreman who had related the conditions to the roof bolting crew. The roof in the affected area fell while only a minimum amount of temporary support was being installed. This violation was revealed during a fatal roof fall accident investigation.

The order of vacation dated September 12, 1983, states:

September 12, 1983 at 1:50 p.m. As a result of a manager's conference held on 9-8-83, new information was presented by the operator and UMWA Local 3548 committeemen, a violation did not exist. The citation No. 2111785 issued on 8-5-83 is hereby vacated.

The order of modification dated October 26, 1983, states:

104(a) Citation No. 2111785 issued 8/5/83 for a violation of 75.200 and vacated 9/12/83 is modified to restore the original citation, change type of action to a 104(d)(1) citation, negligence from low to moderate. The modification is a result of additional information received after the manager's conference and as a result of a re-evaluation of the condition. The citation had been previously terminated on 8/5/83.

The order of vacation dated January 30, 1984, states:

104(a) Citation No. 2111785 issued on 8-5-83 for a violation of Section 75.200 vacated on 9-12-83 as a result of a Health and Safety conference and later modified on 10-26-83 to reinstate the violation as a 104(d)(1) citation is vacated because of confusion and facts surrounding this citation.

An Accident Report dated September 8, 1983, signed by MSHA inspectors Donald J. Klemick and Michael Bondra recites that a roof fall accident occurred on August 2, 1983, at approximately 10:30 p.m. resulting in multiple injuries to Frank F. Sorbin, a roof bolter helper and causing his death on August 4, 1983. According to the report mining was going on in the belt entry. The coal seam was 4 feet high but because this was the belt entry, an extra 2 feet of top rock was being taken down. On the prior shift, however, the left side of the place had been mined to a height of 7 feet so that when mining continued at the proper 6 foot height a brow of one foot was created. Coal was mined on the right side for 20 feet and then 3 or 4 temporary supports were installed. The continuous miner then moved to the left side mining coal and top rock, and 3 posts were installed. The roof was chipping near the brow in the center of the place so the miner moved back to the right, knocked out the posts and cut down more top. After 10 feet of top rock had been cut down, additional chipping was scaled down with the head of the miner. A cutter (crack) appeared after two or three shuttle cars of rock had been cut down from the right side. The section foreman cautioned the men to be careful and to install roof jacks on both sides of the cutter. After some jacks were installed, the rock fell on Mr. Sorbin. The Accident Report states in its opening paragraph that the rock fell as Mr. Sorbin was preparing to install a temporary roof support, but in paragraph 8 of the Discussion and Evaluation, the report states that it was not established what Mr. Sorbin was doing at the time of the accident. The report concludes that the roof was not supported or controlled adequately to protect miners from a roof fall, that the accident occurred because management failed to have a roof supported adequately after a known bad roof condition was observed, and that failure to maintain a uniform roof horizon at the working face may have been a contributing factor.

Although, as already noted, the citation had been vacated on September 12, 1983, the operator through Mr. Edward J. Onuscheck, Vice President - Safety and Training, wrote Mr. William R. Devett, the MSHA sub-district manager, on September 20, 1983, objecting to various statements in the report. Mr. Devett responded by letter dated October 28, 1983, agreeing to certain changes, but concluding that there was a lack of additional supports where needed adjacent to the cutter and that the placement of temporary supports was near the minimum. As appears above, two days previously on October 26, the citation was reinstated as a section 104(d)(1) citation.

At the hearing several witnesses testified to explain the various actions MSHA had taken. Harry Thompson, a supervisory coal mine safety and health inspector with responsibility for the subject mine, testified that on the morning of August 3, 1983, he accompanied Michael Bondra, one of the inspectors under his supervision, on the continuation of a regular inspection they were conducting at the mine (Tr. 16). Mr. Thompson stated that at 9 a.m. he and Mr. Bondra looked at the area and that Mr. Bondra measured the distances between roof supports in the subject area, but according to Mr. Thompson they were not on an investigation (Tr. 17, 23-24). Neither he nor Mr. Bondra talked to anyone who had been at the scene at the time of the accident and at that time he did not know when the foreman became aware of the cutter (Tr. 23, 27, 32, 37). He also stated he did not know any of the circumstances surrounding the accident such as when the cutter appeared (Tr. 35). He and Mr. Bondra did not evaluate the situation beyond taking the measurements. Mr. Thompson was of the opinion that when the accident occurred the operator was in the process of setting temporary supports, although he spoke to no one who was there and although other witnesses indicated that no one knew for sure what the decedent was doing when he was killed (Tr. 35-37, 39-40, 70-72, 158-159). Despite the fact that his knowledge of what happened on the prior night was limited in the manner he described, Mr. Thompson expressed the view at the hearing that there was no violation because the roof was supported adequately and the requirements of the plan were met (Tr. 26, 31, 33, 39). Moreover, Mr. Thompson told company officials on the morning of August 3 that there had been no violation at the time of the fall (Tr. 20-21, 42).

Note must also be taken of Mr. Thompson's telephone call at 3 p.m. on August 3, to Mr. Lenyo, the acting sub-district manager. Mr. Thompson told Mr. Lenyo there were no violations and he told him about the cutter, but not about the brow (Tr. 21-22, 24-25, 26-28, 160). Mr. Thompson also advised Mr. Lenyo that the decedent was setting temporary supports when he was killed although as pointed out above, Mr. Thompson did not speak to anyone who was there at the time and others thought there was no way to tell what the decedent was doing (Tr. 35-36, 70, 148, 158-159).

Finally, Mr. Lenyo testified that he spoke to Mr. Thompson at 2 a.m. on August 3, before Mr. Thompson went to the mine at which time they both agreed it would be good if they knew exactly what happened there in case something should develop (Tr. 147-148). This earlier call renders untenable Mr. Thompson's assertion that he was just on a regular inspection and not conducting an investigation. In his testimony Mr. Thompson did not mention the 2 a.m. phone call.

Mr. Bondra, the MSHA inspector who visited the area with Mr. Thompson on August 3, testified that he took measurements and saw no violation (Tr. 44-45, 57-58). He also told everyone concerned at the mine that he was there as a regular inspector and was not on an investigation (Tr. 44). Mr. Bondra was of the opinion that the roof had been adequately supported and that additional supports would not have helped (Tr. 58, 62, 69-70). He believed roof conditions were good although a brow and cutter were present (Tr. 73). Mr. Bondra stated the brow might or might not have contributed to the instability of the roof (Tr. 86). He further admitted that it would have been better to set additional supports as soon as the cutter was seen and that reducing the distance between supports is good practice, under circumstances such as were present here (Tr. 74, 79-80).

After the decedent died, Mr. Bondra was appointed to the 3-man investigation team (Tr. 46-47). The investigation began on August 4 (Tr. 47). After the investigation was completed, a 104(a) citation was issued on August 5 (Tr. 48). Mr. Bondra stated that he did not believe a citation should have been issued although the other team members thought it should (Tr. 60). The citation was issued by

Mr. Rine, another member of the team (Tr. 50, 151-152). However, Mr. Bondra signed the Accident Report dated September 8, 1983, which as set forth above, blamed the operator for not supporting the roof adequately after a known bad roof was observed and for failing to maintain a uniform roof horizon (Tr. 61).

Moreover, on the same date as the Accident Report, a manager's conference was held at the request of the operator to discuss the validity of the citation issued on August 5, 1983. Mr. Robert Nelson, a supervisory coal mine inspector in the Indiana, Pennsylvania Field Office, the same office as Mr. Thompson, was assigned by the District Manager one or two days previously to handle the conference (Tr. 92-93). As set forth above, the supervisory inspection of the subject mine was Mr. Thompson's responsibility (Tr. 16, 137). Mr. Nelson had the same duties with respect to other mines covered by the office (Tr. 137). At the conference Mr. Nelson was told by company and union people that the operator was in the process of starting to correct the situation by setting temporary supports (Tr. 97-98, 102-103). Mr. Nelson was also "acutely aware" that Mr. Thompson and Mr. Bondra believed there was no violation and had issued no citation on August 3 (Tr. 101). According to Mr. Nelson, Mr. Bondra was not in the conference room but when company and union people said he was in the subject area on August 3 doing an investigation, Mr. Bondra was called into the room and at that time stated he was there to get information (Tr. 96). This is, of course, at variance with the descriptions of a regular inspection given by him and Mr. Thompson in their testimony (Tr. 23, 44). As a result of what he was told, Mr. Nelson decided the citation should be vacated (Tr. 102-103). He wrote the wording and Mr. Bondra, as the regular inspector for the mine signed it (Tr. 103).

Thus, on September 8, 1983, Mr. Bondra's name appeared as co-author of the Accident Report, which places responsibility upon the company for the accident. Just a few days later, Mr. Bondra's name also appeared on an order vacating the citation. Mr. Bondra admitted he was wrong to sign the Accident Report since he did not agree with it (Tr. 62-69). Moreover, Mr. Nelson's decision to vacate was based on incomplete information. Mr. Nelson knew about the chipping and the cutter but not about the brow (Tr. 115). In addition, he did not know the distances between the roof supports (Tr. 116-117). All he had was a rough sketch drawn by the company (Tr. 116-117). He was thinking the supports were 3 feet

apart and testified that 55" inches (5" less than the 5' required by the plan) meant nothing (Tr. 117). Finally, Mr. Nelson did not see the Accident Report before he decided to vacate (Tr. 107). He telephoned Mr. Lenyo, the acting sub-district manager, to see if the Accident Report could be held up, but Mr. Lenyo said it was being printed and that corrections would have to be made afterwards (Tr. 103-104, 157). Mr. Nelson did not question this (Tr. 104). Mr. Lenyo testified he had no problem with Mr. Nelson's vacation because Mr. Nelson would have to justify it in writing to Mr. Devett, the sub-district manager (Tr. 152). From this scenario it appears that this is not a case of the left hand not knowing what the right hand is doing. Everybody knows what is going on but nobody seems to care.

When Mr. Devett, the sub-district manager, returned from his vacation, he was concerned because the September 8 manager's conference had been held without any of the accident investigation team being present (Tr. 180). Another meeting was held on October 25 as a result of which it was decided to reissue the citation under section 104(d)(1) charging unwarrantable failure by the operator (Tr. 180-182). Mr. Nelson testified that at the meeting of October 25 he learned for the first time that chipping had been going on while the operator had been mining, that the foreman did not give specific instructions to support the place, and that after looking at the distances MSHA believed the operator was setting supports only a little closer than normal (Tr. 120-121). Mr. Lenyo believed that after the cutter appeared, spacing was inadequate and that there should have been supports outby the cutter (Tr. 166-168). Mr. Devett said much the same thing (Tr. 189).

The final turnabout occurred two days before the hearing when the citation was vacated again (Tr. 51). Once again, Mr. Bondra, the regular inspector, issued the vacation order but he did not participate in the decision to vacate (Tr. 51-52). He just wrote it and issued it (Tr. 52, 84-85). That this might be confusing and misleading to the operator and others apparently did not occur to MSHA officials. But in his testimony Mr. Bondra touched upon what appears to have been one of the principal reasons for the final vacation of the order, i.e. he and Mr. Thompson who were first on the scene did not issue a citation (Tr. 52). Mr. Nelson testified that Mr. Thompson wanted the re-issued citation vacated and spoke to Mr. Devett about it (Tr. 136). Mr. Lenyo stated

that he agreed with the second vacation because he thought MSHA had created a hardship on the company in that Mr. Thompson and Mr. Bondra had not recognized a violation on August 3 (Tr. 155). After referring to the fact that on August 3 Mr. Thompson and Mr. Bondra told the company there were no violations and mentioning all the subsequent confusion, Mr. Devett said that he came to believe that in fairness to the company the citation should be vacated (Tr. 182-184, 186-187). After going back and forth and back and forth, MSHA apparently decided it was stuck with what had been done in the first instance.

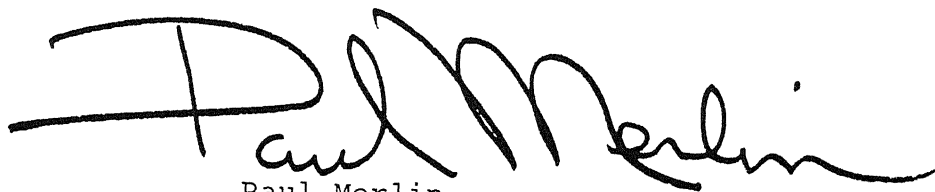
It is not surprising that MSHA officials should have differing opinions about a case such as this. The facts are exceedingly complex and as might be foreseen, give rise to varying conclusions. The record is replete with differences over the effect of the brow, use of the continuous miner to cut down top that had been chipping, etc. This is to be expected. What is disconcerting is that in a fatality case such as this, MSHA apparently had no mechanism for resolving such differences, thereby enabling it to make a definitive and reasoned decision about how to proceed and present a consistent position to the operator and everyone else involved.

The operator has been treated unfairly. But not because it was cited for a violation it did not commit. That is a question which will not be answered because of the way this case has been handled. This independent Commission cannot now decide whether the operator violated the Act since there is no outstanding citation. It may well be that if MSHA had proceeded with the case, the operator would have successfully defended. Or after MSHA properly considered the matter those in authority might have determined on the merits that there was no violation. What transpired in this case is set forth herein only to demonstrate how MSHA acted. First exonerated, then cited, then exonerated, then cited again, and finally relieved of responsibility for any violation, the operator was made to go around in circles. This is the unfair treatment of the operator which this record demonstrates.

But this case has another, even more unfortunate consequence. A miner is dead. Because the government agency charged with enforcing mine safety has not properly discharged its statutory responsibilities, the public interest, as expressed in the enactment of the Mine Safety Act, has been frustrated.

The operator has moved to withdraw its notice of contest. The motion is Granted.

This case is DISMISSED.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 29 1984

CHADRICK CASEBOLT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 83-56-D
: MSHA Case No. BARB CD 82-43
FALCON COAL COMPANY, INC., :
Respondent : South Fork Surface

DECISION

Before: Judge Kennedy

Statement of the Case

This discrimination complaint is before me on the operator's motion to dismiss for failure to state a claim upon which relief may be granted. 1/ Since the motion relies upon matters outside the pleadings, the motion will be treated as a motion for summary decision. Under Rule 64, a motion for summary decision may be granted where the pleadings and matters considered outside the pleadings such as depositions, answers to interrogatories, admissions, and affidavits show (1) there is no genuine issue as to any material fact and (2) the moving party is entitled to judgment as a matter of law. See also Rules 12(b), 56 of the Fed. R. Civ. P.

For the purposes of the motion, the operator concedes complainant can establish a prima facie case of unlawful discrimination. This notwithstanding the operator contends that the material facts not in dispute establish that entry of a remedial order is inappropriate because (1) complainant suffered no loss of pay since the job to which he was reassigned when he failed the Tech II qualification tests pays more than the jobs for which he was found unqualified, (2) a bona fide economic retrenchment subsequently eliminated the job of Tech II, surveyor, to which complainant seeks instatement, and (3) complainant's lack of technical qualifications for both the job of Tech II, surveyor, and Tech II, draftsman/mapper, bars complainant's assertion of entitlement to either of these positions solely by reason of his competitive seniority.

1/ The complaint charges a wrongful interference with Complainant's bidding (bumping) rights under Falcon's collective bargaining agreement.

Complainant agrees that as a result of the discrimination alleged he suffered no loss of pay and that the job of Tech II, surveyor, to which he initially aspired was "abolished in October 1982 for bona fide economic reasons." 2/

Nevertheless, complainant asserts that under the broad authority to fashion "make whole" remedies conferred by section 105(c)(3) the trial judge should (1) hold a hearing to determine whether there was a nexus at least in part between the protected activity alleged and the claimed discriminatory disqualification, and (2) upon a finding that such discrimination occurred issue (a) an order requiring the operator to create a vacancy for a Tech II, surveyor, job and override the competitive seniority or bidding rights of other miners to place complainant in that job or (b) override the seniority rights of incumbents in the remaining Tech II, surveyor, jobs in order to instate complainant or (c) if complainant's right to the surveyor and the draftsman/mapper jobs is barred, award complainant "front pay," i.e., monetary damages for his temporary (3 months) loss of opportunity and for the emotional, psychic and domestic distress brought on as a result of his reassignment to a higher paying but lower status job. 3/

2/ In May and October 1982, there were two company-wide reductions in force necessitated by the loss of contracts to supply coal to the TVA.

3/ Complainant states that as a result of the operator's discriminatory action:

I have been taken away from a job that I cared about, one that promises a good future. It also deprived me a lot of times with my family by having to work nights. It placed me in a dangerous situation of which I was not prepared for. It has deprived me of my rights within the contract and the MSHA laws, and also I had a psychological trauma which has brought hardship on my family life. It has been very hard for me to accept that the company would permit something like this to occur.

Findings and Conclusions 4/

Casebolt's Employment Record

Chadrick Casebolt, a white, male miner and resident of Compton, Kentucky, was first employed by Falcon Coal Company, a subsidiary of Diamond Shamrock Corporation of Lexington, Kentucky on December 13, 1976. His job was that of tippie worker at the Breathitt County Tipples. Three months later his immediate superior recommended he be discharged for unsatisfactory work performance. After a grievance hearing it was found the recommendation stemmed from a personality conflict between Mr. Casebolt and his supervisor, Mr. Carpenter. 5/

Arrangements were made to transfer Mr. Casebolt to the Engineering Department. Thus in March 1977, Casebolt found himself assigned as an Engineer Helper in Falcon's Engineering Department working under the supervision of the Chief Engineer, Chester Stevens.

Casebolt's run-in with Carpenter did not sit well with his new supervisor. Statements from several individuals who were in the Engineering Department at the time attest that Stevens let his dislike for Casebolt be widely known among his coworkers. Stevens told them he was forced to take Casebolt in the Engineering Department and that he did not want anyone to help Casebolt learn the job or show him how

4/ I wish to emphasize that my findings with respect to the facts and background of the discrimination alleged are made solely for the purpose of determining the motion. Because I have not heard the witnesses, I cannot finally resolve the conflicts in witness statements or the questions of credibility presented. As the story unfolds, the reader will understand why resolution of these conflicts is irrelevant to my ultimate disposition.

5/ The record shows that Mr. Casebolt holds a BA degree (Class of '71) from Morehead State University with a major in Physical Education and minors in Biology and Sociology. At the time of his employment by Falcon in 1976 he was 29 years old, married with a family. He may have been over qualified in terms of education for the job of general laborer at a mine preparation plant. His employment application shows he did not seek employment in a job involving mechanical or engineering skills but something that would enable him to employ his clerical skills.

things were done. Stevens also told employees in the Engineering Department that he did not care how they treated Casebolt.

For his part, Stevens said Casebolt "has himself over-rated" because of his college degree. Stevens said Casebolt is "weak in mathematics" and that after three months in the Engineering Department he decided to assign him to the job of water sampler. Performance of this job did not require any of the skills needed to be a surveyor or draftsman/mapper which were the jobs to which others in the Engineering Department were assigned. ^{6/} Management animosity against Casebolt apparently goes back, as his coworkers said, a long way.

When Casebolt started work in the Engineering Department he was assigned as a rod and chain man with one of the surveying crews. He completed his probationary period three months later. At that time (June 13, 1977), his performance was rated as "substandard but making progress." About a month after this evaluation, Stevens changed Casebolt's job from that of surveyor to that of water sampler. He continued, however, to be classified and paid as a Tech II, Engineer Helper. He worked under Stevens' direct supervision. The new assignment deprived Casebolt of the opportunity for any extensive on-the-job training as a surveyor or draftsman/mapper. Nevertheless, the pay was the same and, with the exception noted below, Casebolt remained in the job without complaint for the next five years.

During the period in question, March 1977 to November 1982, Falcon claims its Engineering Department consisted of a Chief Engineer who supervised the department and two divisions consisting of (1) the three field surveying crews and (2) the two miners assigned to drafting/mapping work. The water sampling job was first assigned as an additional duty to the members of the surveying crews. After Casebolt was assigned to it, however, it became his full-time job and the others did not participate. While Casebolt claims his understanding was that he was qualified to perform any Tech II position in the department because his classification for pay purposes was the same as the other Tech II's, it appears that he was already in a "dead end" job.

^{6/} The operator claims that the knowledge and skill required of a water sampler are comparable to those of "high school aged lifeguards [who perform] similar water sampling duties at swimming pools in the summer."

Casebolt first became concerned that his competitive seniority within the department was being adversely affected by his job as water sampler in January 1981. 7/ Mark Campbell, the new Chief Engineer, advised him that to bump into one of the other jobs in the department he would have to pass written tests of his ability to solve problems in algebra and trigonometry. Casebolt was reluctant to take these tests, fearing that if he did not pass they would be used against him. At the urging of Campbell, Casebolt finally took the written math exams for the jobs of surveyor and draftsman/mapper on October 15 and November 12, 1981. On the first test Casebolt scored 47.2% and on the second 51.6%. The arbitrator found a passing score of 70% was required to qualify for the Tech II surveying and draftsman/mapper jobs. 8/ Casebolt was afforded the opportunity to retake the tests in July 1982 at the time he tried to bump Mark Sheffel from a Tech II, surveying position but according to Jay Watts, the Chief Engineer, Casebolt declined to take the tests. It was Casebolt's position then, as now, that because he was already in the Engineering Department he could bump on the basis of his competitive seniority alone and that his competitive seniority was in no way qualified by a requirement to show a proficiency in mathematics.

Work As A Water Sampler

As a water sampler, Casebolt was responsible for collecting water samples from the silt ponds located at respondent's various surface mines. Because this required him to drive and work alone in remote mountainous terrain where dangerous conditions existed, he requested his 1978 pickup truck be furnished with a two-way radio. On several occasions during 1978 and 1979, Casebolt requested such communications equipment. It was not until some time in

7/ Casebolt's concern over his job security may have been stimulated by the cancellation of a large coal supply agreement with TVA. As a result of this contract cancellation, Falcon began to reduce its work force on January 7, 1980.

8/ There is no claim that Casebolt failed these tests because of any protected activity.

1980, however, that Mr. Stevens provided Casebolt with a Citizens Band radio for the pickup truck. 9/

Casebolt claimed that because of its limited range and power this radio did not provide him with a means of communication in the most remote areas. He continued to complain of his need for a two-way AM/FM radio that would allow him to remain in communication with his home office at all times. He was not furnished with this piece of equipment until June 15, 1982. Two weeks later he was bumped from his job as Tech II, water sampler by Jim Hutchinson a Tech II, surveyor with greater competitive seniority.

The Rif's

During 1982, two major series of seniority bumpings (Rif's) took place. The first of these occurred on June 7, 1982 in response to a reduction in force which Falcon began on May 21, 1982. The Rif first hit the Engineering Department when Zane Watts successfully bumped Woody Gabbard from a Tech II, surveyor job on Field Crew #1. The consequences of this series of seniority bumpings is shown on the attached diagram, Exhibit 1.

As Exhibit 1 shows, Woody Gabbard bumped Archie Combs who bumped Ben Johnson who bumped Jim Hutchinson who bumped Chad Casebolt. Casebolt then attempted to bump Mike Sheffel a Tech II, surveyor with less seniority. At this point, Falcon invoked the provisions of Section 9(c)(iii) of the collective bargaining agreement to require Casebolt demonstrate his qualifications for the position by taking a

9/ Falcon's failure and refusal to furnish Casebolt with this equipment until almost two years after it was requested may have constituted a violation of 30 C.F.R. 77.1700. This provides:

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

five-day field performance test and a written test of his proficiency in algebra and trigonometry. 10/

Falcon asserted and the arbitrator agreed that the provision that requires senior bumping rights to be exercised in the same manner as bidding on a new job posting (Section 9(b)(iv)) required Casebolt to meet the job qualifications

10/ The collective bargaining agreement between Falcon and the company union, Falcon Coal Company Employees' Association, is dated July 13, 1981. The provisions invoked provided as follows:

9. SENIORITY, LAYOFF AND JOB POSTING. (a) Seniority shall be determined on the basis of the length of continuous full-time employment with Falcon . . .

* * *

(c) If a reduction in the work force is made, layoffs of Association Members shall be based upon company-wide seniority and shall be accomplished as follows:

* * *

(iii) Subject to the provisions of subsection (iv) below an Association Member with sufficient seniority to remain in the Company after such layoff, but who has been displaced in the provisions of this section, shall exercise his seniority rights within five (5) days and displace any Association Member with less seniority. An Association Member so exercising his seniority shall have five (5) working days in which to prove his ability to perform the job, just as if he had obtained the new job through the bid system provided for herein. In the event that such an Association Member is unable to perform such new job, he shall again exercise his seniority rights until he finds a job he can perform.

for Engineering Tech II's as set forth in Exhibit "B" of the collective bargaining agreement. 11/ Section 9(b)(i).

Casebolt, as noted, refused to take the written math exam. Despite this, Falcon afforded him the opportunity to take the five-day field test. This was done under the supervision of Jay Watts, the Chief Engineer at the time. The test was administered on July 6, 7, 8, 9 and 12, 1982. Mr. Casebolt was asked to perform the same nine duties usually required of all Tech II, surveyors. These are run level, set tripods, rod for cross sections, roll up tape, use reducing arc, keep field notes, reduce field notes, plot cross-section notes and plot pit surveys. Watts's notes of Casebolt's performance during the five-day period showed he performed poorly on most of the subjects on which he was tested. Based on an evaluation of his performance by Watts, Larry Allen and Mark Campbell on July 12, and on the fact that Mike Sheffel had five years experience on the job with adequate performance ratings, Falcon declared Casebolt unqualified to bump Sheffel.

Approximately a week later, Casebolt attempted to bump into the Tech II drafting/mapping position held by Charles Booth. He was found disqualified for this position also but has not alleged that this disqualification resulted from any wrongful interference with his bumping rights.

While Casebolt was attempting to bump into the Tech II surveyor job held by Sheffel, Sheffel was attempting to bump into the drafting/mapping position held by Booth. Sheffel was also found disqualified for Booth's position.

11/ While Falcon admits that "Passing the written exam is not required if the employee's performance during the five-day qualification period or previous work experience demonstrates that the employee has the requisite mathematical proficiency," it claimed Casebolt's work experience and previous demonstrated math deficiency did not justify waiving the written math test in his case. The arbitrator agreed.

The job qualifications set forth in Exhibit "B" to the collective bargaining agreement are as follows:

5. ENGINEERING-TECHNICIAN II--Knowledge of general mathematics and fundamentals of Algebra and Trigonometry for use in the solution of routine engineering oriented technical problems. Proficient in engineering, lettering and drafting. Knowledge of proper rod and chain techniques.

During the week of August 2, 1982, Casebolt successfully bumped into his present position as a rock truck driver on the night shift. This marked the conclusion of the bumping that began in the Tech II area with Zane Watts on June 7, 1982.

The Arbitration

Casebolt took the question of his disqualification for both Tech II jobs to arbitration and on August 18, 1982, the arbitrator denied the grievance. At the arbitration hearing Casebolt did not contend that he was disqualified because of any activity protected under the Mine Act. What he did contend was that it was discriminatory for Falcon to require him to demonstrate proficiency in the duties of a Tech II when none of those holding such jobs had been required to demonstrate such proficiency. Casebolt's lawyer argued that since he and the others were classified as Tech II engineers at a time when there were no contractually specified qualifications for the position Falcon could not condition the exercise of his competitive seniority rights on a showing that he met the job qualifications set forth in Exhibit "B" to the collective bargaining agreement.

The arbitrator rejected this and held the company was not estopped to challenge Casebolt's qualifications for a Tech II surveying or mapping job because,

The Company has the right to expect any employee who bumps into a position to have the requisite abilities at the time of the bump or at least be able to demonstrate adequate ability within the five (5) day qualification period established by the Agreement. It must be remembered that the Company not only owes the bumping employee an opportunity to show his ability in the new job, but also owes the employee who is being bumped the opportunity to retain his position if the bumper does not have the requisite abilities.

In essence, then, it is my opinion that, under the circumstances before me in this case, merely because the Grievant was properly classified as an Engineering Technical II does not mean that he was properly qualified for a job on the mapping and survey crew. The duties and qualifications of a water sampler are so separate and distinct from those of the mapping and survey crew that I cannot conclude that the

classification of Engineering Technician II automatically qualifies an employee to perform all duties now within that classification, when taking into consideration the fact that the Grievant's classification preceded the contractually established minimum required abilities. Dec. p. 7.

The arbitrator decided that while "no other Engineering Technician II has ever been required to take a written test or go through the five (5) day qualification period in order to bump into a job of another Engineering Technician II" the written and field testing were particularly appropriate for Casebolt because "no other Engineering Technician II has been almost exclusively assigned to water sampling duties, with only limited experience and other abilities required of that classification." Id., p. 9.

With respect to the claim of "premeditated, retaliatory, discrimination," the arbitrator found that while the evidence showed the Chief Engineer, Jay Watts, disliked Casebolt and may have pressured him in such a way as to prejudice Casebolt's performance during the five-day field test, a review of Watts's contemporaneous notes of Casebolt's field performance and the written math tests, which were unaffected by Watts's conduct, was persuasive of the fact that he did not possess the job qualifications prescribed by the collective bargaining agreement. Id. pp. 3, 6, 8, 9. Thus, the arbitrator held that, notwithstanding the discrimination alleged, the evidence was "sufficiently tangible and objective" to support the Company's decision to disqualify Casebolt from the positions of Tech II, surveying and mapping. Id. p. 9.

Casebolt has never contested the arbitrator's finding that he failed to demonstrate a lack of proficiency in mathematics. Complainant's contention before me as before the arbitrator is that he was not bound by the terms of the collective bargaining agreement to show a proficiency in algebra and trigonometry because (1) he was classified as a Tech II before the job qualifications were put in the contract, (2) he continued in the classification for some time after they were inserted, and (3) no other Tech II was required as a condition of exercise of his bumping rights

to show such proficiency. As we have seen, the arbitrator rejected each of these contentions holding that under the terms of the contract, as he construed it, the operator could require Casebolt to demonstrate his proficiency in the solution of routine engineering problems involving a knowledge of general mathematics and the fundamentals of algebra and trigonometry. 12/

The results of the 1981 math tests, which Casebolt took voluntarily and which he has never claimed were tainted with Watts's alleged discriminatory conduct, were reliable, probative and substantial evidence of his lack of knowledge and skills for the job of surveyor or mapper. This evidence which came from his own hand at a time when he was trying to qualify for the jobs in question is, I believe, dispositive of any claim that but for his protected activity he would not have been disqualified. Consequently, whether or not Watts's motive was as malevolent as claimed, the smoking gun of disqualification came from Casebolt's own hand.

In arriving at this conclusion, I have given appropriate, but not controlling, deference to the arbitrator's "specialized competence" in interpreting the seniority provisions of the contract. 13/ I find this position to be in accord with both the doctrine of deference with respect to arbitral decisions that interpret the competitive seniority provisions of collective bargaining agreements and complainant's right

12/ The arbitrator stated that "I have personally reviewed both tests taken by the Grievant and find them to be fair, appropriate and reasonable." Casebolt has never challenged the fairness of the math tests.

13/ While no transcript was made of Casebolt's arbitration hearing, a complete and authentic copy of the collective bargaining agreement in question has been furnished in support of the operator's motion. The arbitrator's decision contains a recitation of the evidence submitted by the parties. This closely parallels that in the MSHA investigation file which is also in the record.

to a de novo review of his claim by this trial tribunal. 14/ In addition to the fact that Casebolt cites no authority for disregarding the contract to which he was a party as a member of the Falcon Coal Company Employees' Association, a close scrutiny of the contract shows no evidence of an intent to exclude Casebolt from the conditions attached to the exercise of seniority bumping rights by Section 9(c)(iii) and Exhibit "B". Further, I agree with the arbitrator that in view of Casebolt's failure to pass the written math exam less than a year previously and his limited experience on-the-job it was reasonable for Falcon to require Casebolt to demonstrate his qualifications for both jobs. I find particularly unappealing the argument that the alleged deficiencies of others in the engineering department excused Casebolt's lack of qualifications. In this connection, I note Casebolt has never claimed that the man he tried to bump, Mike Sheffel, was lacking in any of the essential qualifications required by the contract. Accordingly, whether I apply the doctrine of deference or my own de novo review of the contract I conclude Casebolt's competitive seniority rights were subject to the job qualification provisions of the contract. 15/

14/ See W. R. Grace & Co. v. Local 759, _____ U.S. _____, 76 L Ed 2d 298, 306 (1983). See also the NLRB's deferral policy in Morris, The Developing Labor Law, Ch. 20, Accommodation to Arbitration, (2d ed. BNA, 1983) and Olin Corporation, 268 NLRB No. 86 (1984). No Commission decision has previously touched on the question of the extent to which a trial judge should defer to arbitral decisions involving the interaction of job qualifications with the exercise of competitive seniority rights. Prior decisions of the Commission have focused on the standards governing the weight to be accorded to credibility and disputed factual findings by arbitrators with respect to activity involved in section 105(c) retaliation (discrimination) cases. See, David Hollis v. Consolidation Coal Company, _____ FMSHRC _____, decided January 9, 1984. Compare, Alexander v. Gardner-Denver, 415 U.S. 36, 59-60, n. 21 (1974). In Gardner-Denver, the Supreme Court recognized the "specialized competence of arbitrators" in interpreting collective bargaining agreements. Id. at 53, 57.

15/ Since my de novo determination is congruent with that of the arbitration, I find it unnecessary to deal with Casebolt's claim that the arbitrator was not technically authorized to hear and determine his grievance.

The Complaint To MSHA

While the grievance was pending before the arbitrator, Casebolt filed a discrimination complaint with MSHA. This complaint alleged substantially the same acts of discrimination as were alleged under the grievance except that the MSHA complaint alleged the discriminatory treatment stemmed from a protected activity instead of a personality conflict 16/ and general animus against him on the part of his supervisors.

MSHA's investigation confirmed that several of Casebolt's co-workers witnessed acts of continuous harrassment by Watts during the five-day test period. One individual claimed he saw Watts "throw rocks at Casebolt when he was trying to set up a tripod." Mike Sheffel told the investigator that after he was bumped by Casebolt, but before Casebolt was found disqualified, Jay Watts told him he did not like Casebolt and "would make sure Casebolt did not qualify for the surveying job." Watts denies having ever said this. He also denied that Casebolt's requests for a two-way radio had anything to do with his disqualification. He said that Casebolt had worked with a surveying crew for about two months several years earlier but had no experience with new equipment introduced since then. Watts thought the C.B. radio which he claimed was furnished Casebolt in 1979 provided an adequate means of communication.

For the purposes of the motion, I do not resolve the conflicts in the statements of the witnesses or attempt to determine the "true" motive for Casebolt's disqualification. I am assuming for the purposes of the motion that Casebolt was disqualified at least in part for his claimed protected activity.

16/ For example in the grievance proceeding the Union, on behalf of Casebolt, offered evidence which showed that Watts told Sheffel, the miner Casebolt was trying to bump, that Sheffel need not worry because Watts did not like Casebolt and would make sure Casebolt didn't qualify for the surveying job. At the arbitration hearing this was cited as showing a premeditated intent to discriminate against Casebolt. The arbitrator found the Union's evidence established a "long-standing personality conflict" between Watts and Casebolt which put Casebolt under pressure during his five-day field test. But, the arbitrator concluded, even if the field test was unfair, the math tests were not and that Casebolt's refusal to retake them was tantamount to an admission that he lacked the knowledge and skills necessary to perform the job.

MSHA declined prosecution of Casebolt's complaint on the ground no violation of section 105(c)(1) occurred and on December 1, 1982, Casebolt filed a pro se complaint with the Commission under section 105(c)(3). After responding to the pretrial order, Casebolt employed his present counsel.

The Second Rif

In the meantime, on October 15, 1982, a second company-wide reduction in force necessitated by the loss of additional TVA contracts resulted in the elimination of one Tech I and two Tech II jobs in Field Survey Crew #3. See Exhibit 2 attached. Archie Combs who was a Tech I in Field Crew #3 bumped Jim Hutchinson, who had earlier bumped Casebolt, from the water sampling job and Hutchinson became a rock truck driver on the night shift with Casebolt. Ben Johnson, who earlier had been bumped from the Tech I job by Archie Combs into a Tech II job bumped Eugene Turner from a Tech II job on Field Crew #2. Turner tried, unsuccessfully, to bump into the Tech II job held by Charles Booth in the mapping/drafting division and then successfully bumped into a job as a rock truck driver with Casebolt on the night shift. Finally, with the elimination of Field Crew #3 Mike Sheffel, whom Casebolt had been unsuccessful in bumping back in July, had to bump into a position as a rock truck driver on the night shift with Casebolt.

Thus, by November 15, 1982, when these realignments had taken place all the Tech I and II jobs in the surveying division were held by men senior in service to Casebolt and two men with greater seniority and experience as either Tech I or II's (Turner and Hutchinson) were driving rock trucks on the night shift with Casebolt. Further, Mike Sheffel who held the job Casebolt tried to bump into was also driving a rock truck on the night shift. For these reasons, the operator contends that even if Casebolt was disqualified as the result of some unlawful discrimination in July 1982 he would still have ended up driving a rock truck on the night shift with his junior Mike Sheffel and his seniors Hutchinson and Turner in October 1982. 17/ I find the material facts not in dispute show (1) that Casebolt was technically unqualified for a Tech II job and (2) that as the result of a bona fide economic retrenchment there is no Tech II job to which Casebolt can be instated without violating the competitive seniority rights of other miners under the collective bargaining agreement.

17/ In April 1983, the Tech II water sampling job was abolished and its responsibilities transferred to the Reclamation Department. I assume, therefore, that Archie Combs may also be driving a rock truck.

Jurisdiction to order instatement depends on my finding not only that Casebolt was deprived of a Tech II position because of unlawful discrimination but that no bona fide business or economic justification exists for its subsequent elimination. Here, however, the undisputed facts show, and Casebolt concedes, that he would have lost any Tech II surveying job he might have occupied in October 1982 when, for bona fide economic reasons, the job (then held by Mike Sheffel) was abolished. 18/

As respondent points out, if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198, n. 7 (1941). Furthermore, back pay does not accrue to a discriminatee for any period after the date he would have lost his position because of lack of competitive seniority or the unavailability of work. NLRB v. Columbia Tribune Pub. Co., 495 F.2d 1384, 1393 (8th Cir. 1974). By a parity of reasoning, the courts have held that

18/ Because the undisputed facts show Casebolt was not technically qualified for a draftsman/mapping job and because I do not read his complaint or response to the pretrial order as alleging his disqualification for this job was tainted by any unlawful intent or motive to discriminate, I decline to entertain any suggestion that Casebolt is entitled to further protract these proceedings by being allowed to amend his complaint. Complainant's case has been gossamer thin from the beginning. I believe Mr. Casebolt has had his day in court, and then some, and that any further protraction of this matter would be unfair and vexatious to the respondent. Because miners often have no professional guidance in the institution of pro se discrimination cases, it would be unjust to apply to them the sanctions ordinarily available to deter the filing of frivolous, unreasonable or groundless claims. If, however, a miner were to insist on pursuing a claim after it clearly appears to be frivolous, unreasonable or groundless the common law sanction for pursuing or continuing vexatious claims, i.e., claims pursued in bad faith may be invoked to deter abuse of the adjudicatory process. See Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978); Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980).

the unavailability of a position due to a bona fide economic retrenchment or reduction in force bars reinstatement of a discriminatee. M.S.P. Industries, Inc. v. NLRB, 568 F.2d 166, 179-180 (10th Cir. 1977); Union Drawn Steel v. NLRB, 109 F.2d 587, 592 (3d Cir. 1940); 48A Am. Jur. 2d § 1580.

In Union Drawn Steel and MSP Industries, the courts held the NLRB could not order reinstatement without a finding that there was work for the discriminatees to do. Again in NLRB v. Federal Bearings Co., Inc., 109 F.2d 945 (2d Cir. 1940), the court held that where depressed business conditions required a reduction in force an employer was not in contempt by failing to reinstate. In the same vein, was the Third Circuit's holding that a company cannot be required to reinstate employees for whom there is no work as a result of curtailment of operations for bona fide economic reasons. NLRB v. Wilson Line, 122 F.2d 809 (3d Cir. 1941). And in NLRB v. Southeastern Pipeline, 210 F.2d 643 (5th Cir. 1954), the Fifth Circuit held that where the employee did not have the knowledge required for a new position created by combining two former jobs and had been given a transfer to another location at the same pay, reinstatement should not be ordered.

The defense of unavailability of work to a claim for reinstatement was also upheld in NLRB v. Sterling Furniture Co., 227 F.2d 521, 522 (9th Cir. 1955). There the court held that under the National Labor Relations Act, the remedial model for section 105(c), it is well settled that an employer may refrain from reinstating a discriminatee during a period when employment is not available for non-discriminatory reasons. Compare NLRB v. United Contractors, Inc., 614 F.2d 134, 137-138 (7th Cir. 1980).

Most closely in point, perhaps, is United Steelworkers of America v. Overly Mfg. Co., 438 F. Supp. 922 (W.D. Pa. 1977). There the court refused to find an employer in civil contempt of a prior order of the court that directed reinstatement of a discriminatee to his job of draftsman with full seniority. The court upheld the defense of impossibility of reinstatement upon a showing that the position no longer existed as well as a change of circumstances that would have rendered enforcement of the reinstatement decree inequitable. The facts showed that during the pendency of litigation to enforce the arbitral award and the appeals that followed the employer had transferred the discriminatee's job of journeyman draftsman from its Greenberg,

Pennsylvania plant to its plant in Glendale, California. Thereafter, the only drafting work available in Greenberg had to be performed by professional engineers who were college graduates because the design work involved the use of higher mathematics. Discriminatee had only a high school education and no formal education in drafting. Discriminatee refused the offer of a job in California and insisted he be paid as a draftsman at the Greenberg plant even if there was no work for him to do.

The court found that while resolution of discriminatee's right to reinstatement was not simple, the absurdity of ordering literal compliance with the order of reinstatement in the light of changed circumstances dictated denial of the Union's petition. 438 F. Supp. 927.

I am cognizant of the fact that the "make whole" remedy to which complainant is presumptively entitled embraces the use of constructive or preferential seniority. But this is true only where complainant's plight is the result of wrongful discrimination. It does not justify catapulting Casebolt into a better position than he would have enjoyed absent the discrimination.

Only if Casebolt could show, as he cannot, that he is driving a rock truck because of the discrimination that occurred in July 1982 would this trial tribunal have jurisdiction and power to abrogate Falcon's seniority system by slotting Casebolt into the system ahead of Turner and Hutchinson or displacing an incumbent. Ford Motor Co. v. EEOC, _____ U.S. _____, 76 L. Ed 2d 721, 733-734, n. 22 (1982); Franks v. Bowman Transportation Co., 424 U.S. 747, 746, 770, 778 (1976); W. R. Grace & Co., _____ U.S. _____, 76 L. Ed 2d 298, 310 (1983). Unlike the EEOC this Commission is vested with power and jurisdiction to adjudicate discrimination claims and to impose sanctions that are enforceable by the courts of appeals. But in the absence of a finding that Casebolt lost seniority as a Tech II as a result of the discrimination assumed it would be inequitable and a violation of the rights of innocent third parties to slot him ahead of them under the collective bargaining agreement's seniority provisions. Casebolt is now, as he was then, ahead of Sheffel on Falcon's company-wide seniority list and is now, as he was then, below Turner and Hutchinson. If a vacancy in a Tech II job occurs he can bid on it ahead of Sheffel and behind his two seniors. That is the agreement he bargained for. It was not affected by what transpired in July 1982.

Since no Tech II job vacancy exists, it is unnecessary to consider whether a lateral transfer under section 9(h) of the contract is an available remedy. Under the circumstances that have prevailed since October 1982, this provision cannot be used to nullify Turner's and Hutchinson's seniority rights. Further, an order compelling reinstatement either directly or laterally to a job that does not exist would result in an egregious form of featherbedding and an abuse of the equitable remedial powers conferred by the Act.

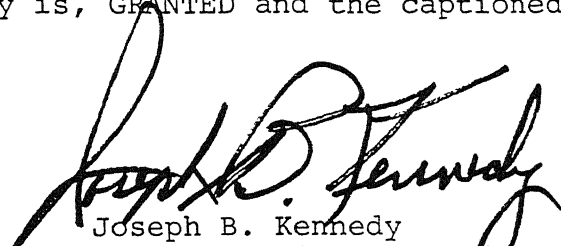
Finally, if no relief is available by means of reinstatement, back pay, or retroactive, constructive, or preferential seniority, it is suggested I award Casebolt "front pay." This term refers to the substitution of monetary relief in lieu of injunctive relief for identifiable victims of discrimination. It has been most widely used in cases where discriminatees were wrongfully denied promotions because of discriminatory hiring or promotion policies. Schlei and Grossman, Employment Discrimination Law, (2d ed. 1983), at 1434-1436. In Franks v. Bowman Transportation Co., *supra*, 777, N. 38, 780-781, the Supreme Court declined Justice Burger's suggestion to use front money as a substitute for constructive seniority but found that under Title VII it was available as a remedy. Casebolt urges that in view of this I fashion a monetary remedy in lieu of reinstatement and thereby avoid infringing the seniority rights of other miners. The difficulty is that Casebolt lost no opportunity, promotion or otherwise. At least not one that can be quantified. Front pay for a lost opportunity must be calculated on the basis of the present discounted value of earnings that are reasonably likely to occur between the date of the lost opportunity and the date of its realization, i.e., promotion, reinstatement, etc. See, Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1975), cert. denied, 429 U.S. 920 (1976).

Because Casebolt lost no earnings or opportunity for promotion there is no basis for making a present discounted value calculation of his claimed injury.

Windfalls are not part of the "make whole" relief to which a discriminatee is entitled. To award Casebolt monetary damages on some unspecified, unquantified basis would not just make him whole it would put him in a better position than other miners who were bumped to the rock trucks for non-discriminatory reasons.

As for the claim that Casebolt is entitled to something for his emotional and psychic distress and loss of consortium by reason of the fact that he had to work nights, all I can say is that life is unfair but that I find no warrant in the statute or precedent for an award of damages for pain and suffering. At least not in this case.

Accordingly, it is ORDERED that the motion for summary disposition be, and hereby is, GRANTED and the captioned complaint DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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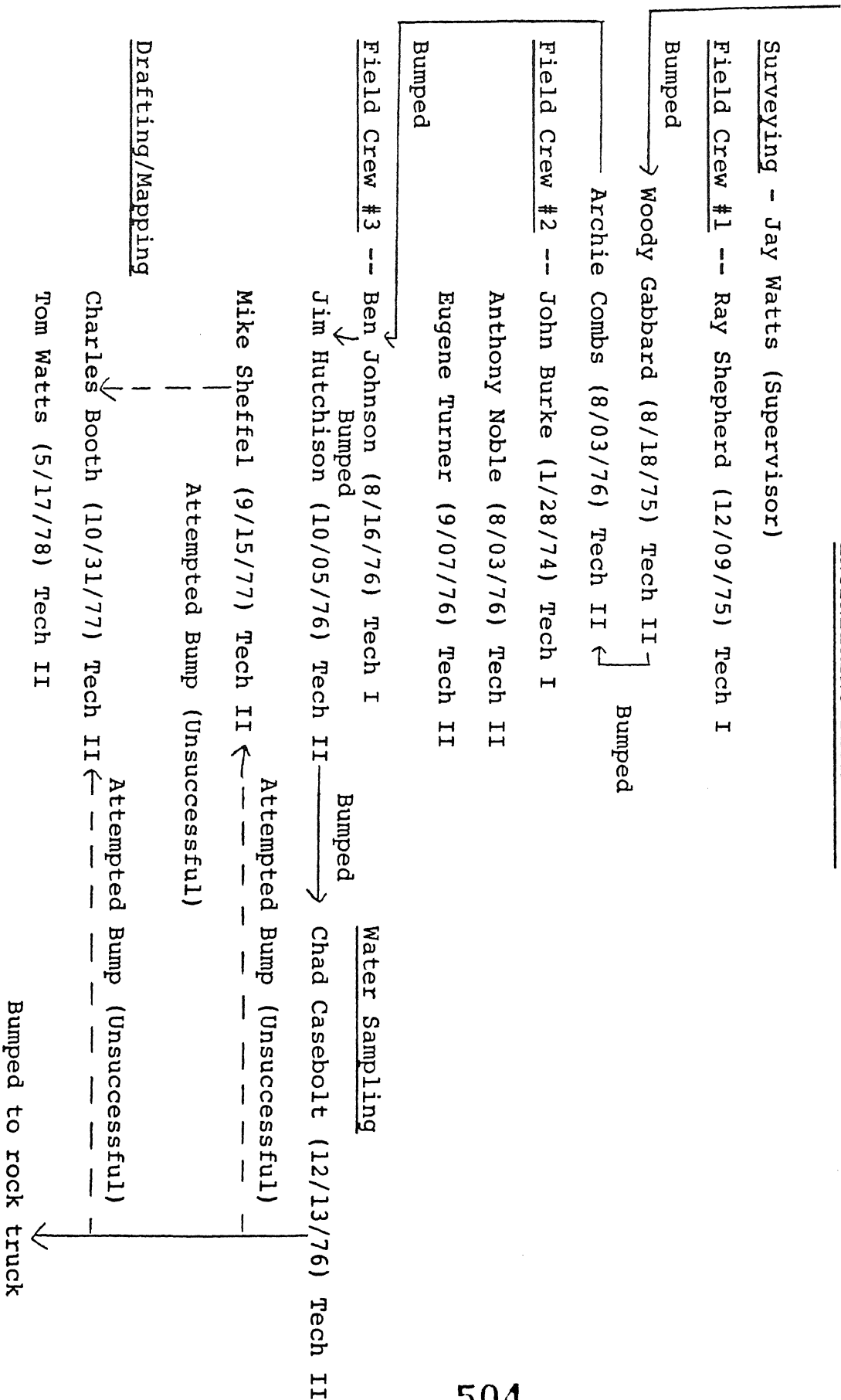
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EXHIBIT 1 (Bumping caused by Zane Watts, 6/7/82-8/9/82)

ZANE WATTS

ENGINEERING DEPARTMENT



ATTACHMENT

EXHIBIT 2 (Bumping caused by elimination of Field Crew #3, 10/15/82-11/15/82)

ENGINEERING DEPARTMENT

PRODUCTION

Surveying

Field Crew #1

Ray Shepherd Tech I
Zane Watts Tech II
Woody Gabbard Tech II

Field Crew #2

John Burke Tech I
Anthony Noble Tech II

----- Eugene Turner

Tech II

Bumped

Rock Truck

Field Crew #3

Archie Combs Tech I
Ben Johnson Tech II
Mike Sheffel Tech II

Bumped

Bumped

Water Sampling
Jim Hutchison II

Bumped

Rock Truck

Bumped

Rock Truck

Drafting/Mapping

-----> Charles Booth

Tech II

Tom Watts

Tech II

Attempted Bump
(Unsuccessful)

ATTACHMENT

